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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,

Appellants,

—against—

CHRIS SCHMID,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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March 17, 1981.

QUESTION PRESENTED

Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

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JURISDICTIONAL STATEMENT

DECISIONS OF THE COURTS BELOW

The decision of the Supreme Court of New Jersey, dated November 25, 1980, is reported at 84 N.J. 535, 423 A.2d 615, and is reprinted in the Appendix ("App.") at pages 1a-47a. The Order of the Superior Court of New Jersey, Law Division—Criminal, dated February 20, 1979, appears in the Appendix at page 48a. It has not been published. The opinion of the Municipal Court of the Borough of Princeton, dated October 30, 1978, has not been published. It appears in the Appendix at pages 49a-69a.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment of the Supreme Court of New Jersey reversing a trespass conviction of appellee. That court held that, under the circumstances of the case, certain provisions of the New Jersey Constitution obligated Princeton University ("Princeton") to let appellee distribute political literature and solicit money on Princeton's campus. Relying on this Court's recent decision in *Prune Yard Shopping Center v. Robins*, ___ U.S. ___, 64 L. Ed.2d 741, 100 S.Ct. 2035 (1980)—which was decided *after* this case was briefed and argued in the Supreme Court of New Jersey—the court below further held that New Jersey's constitutional provisions, as applied, did not offend the U.S. Constitution. In its brief and its oral argument to the state supreme court, Princeton had drawn into question the validity of those provisions as applied to a private university on the ground of their repugnance to the U.S. Constitution.

The decision of the Supreme Court of New Jersey was issued November 25, 1980. A petition for rehearing was timely filed on December 5, 1980, and was denied December 19, 1980. (App. 70a). The Notice of Appeal was filed on March 10, 1980. (App. 71a). This Court has jurisdiction of the appeal by virtue of 28 U.S.C. § 1257(2). *See Prune Yard Shopping Center v. Robins, supra* at 64 L.Ed.2d 751.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment, United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Article I, para. 6, New Jersey Constitution:

> "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . ."

Article I, para. 18, New Jersey Constitution:

> "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances."

New Jersey Statutes Annotated 2A:170-31 (1971):

> "Any person who trespasses on any lands . . . after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof . . . is a disorderly person and shall be punished by a fine of not more than $50."

STATEMENT OF THE CASE

Statement of Facts

The facts in this case were stipulated by the parties.

On April 5, 1978, the appellee was arrested while distributing political literature and soliciting purchases of such

literature on the campus of Princeton University. (App. 1a, 49a). He was subsequently prosecuted for trespassing. (*Id.*)

Princeton is a private, not-for-profit educational institution. (*Id.*) Its stated purposes include "the teaching and general development of students" and "the transmission of knowledge and learning to society-at-large." (App. 28a).

Princeton has regulations which set forth the extent to which the public may use its campus and facilities. Under the regulations in effect in 1978, the public enjoyed a blanket invitation to stroll on Princeton's walkways and grounds and to attend lectures, cultural performances, and other events designated as open to the public. (App. 29a). Princeton did not, however, issue an equally broad invitiation for the public to solicit, advertise, campaign, or otherwise hold forth on University property. The regulations provided that persons and groups not affiliated with Princeton could distribute literature and solicit purchases or donations on the campus only if they first sought and received the express permission of a specified University official. (App. 49a-50a). The policy was to deny such permission unless the person or group applying was invited or sponsored by a Princeton-affiliated person or group. (*See* App. 2a, 32a, 50a).

Appellee was unaffiliated with Princeton University. (App. 1a). He was aware of the requirement that non-members of the University obtain permission before soliciting on University property; he had been told of this policy on February 15, 1978, when he had been specifically forbidden to enter the campus to solicit without first obtaining permission. (App. 3a-4a, 50a). Nonetheless, he did not seek permission to distribute literature and solicit purchases on April 5, 1978. (App. 2a, 50a). When he was found soliciting on campus on that date—uninvited, unsponsored, and unauthorized—he was arrested and subsequently charged with violating New Jersey's general trespass statute, N.J.S.A. 2A:170-31 (1971)[1]. (App. 4a, 49a).

[1] This statute was superseded in 1979 by N.J.S.A. 2C:18-3 (1980).

The Proceedings Below

Defendant was tried for trespass in Princeton Borough Municipal Court on October 20, 1978. As authorized by a New Jersey rule of court,[2] the trial was prosecuted by counsel for Princeton University on behalf of the State of New Jersey. Defendant asserted that he was *entitled* by the federal and state constitutions to conduct political leafleting and solicitation on Princeton University's property. The prosecution contended not only that the defendant had no such right, but also that Princeton's rights under the Fifth and Fourteenth Amendments *precluded* the federal and state governments from compelling Princeton to grant such access. The municipal court held that neither the U.S. Constitution nor state law diminished the right of the University as a private property owner to exclude the defendant from its property. (App. 59a-68a). Defendant was convicted of trespassing and fined $15 plus $10 costs. (App. 68a).

A trial *de novo* upon the stipulated facts was held in the New Jersey Superior Court, Law Division, on February 20, 1979. The defendant was again found guilty and fined $15 plus $10 costs. (App. 48a). At the close of argument, the court stated it was adopting the opinion of the Municipal Court.

The Supreme Court of New Jersey certified the case while it was pending on appeal before the New Jersey Superior Court, Appellate Division. At the invitation of the supreme court, Princeton participated as an intervenor, with all the rights of a party. Princeton asserted in its brief and stressed at oral argument that its own First Amendment rights, and in particular its right of academic freedom, precluded the government from compelling Princeton to allow defendant's activity on its property.

The supreme court held that defendant had a constitutional right under Article I, paragraphs 6 and 18, of the New Jersey Constitution to leaflet and solicit on the campus of

[2] Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey.

Princeton University. (App. 16a-33a). The University, as property owner, was equated by the court with a governmental agency. Consequently, the court held that Princeton could regulate expressive activities by unaffiliated private persons only through neutral and reasonable rules as to time, place and manner. The court found Princeton's requirement for invitation and permission unconstitutional because the University regulations did not meet the standards to which public regulation of expressive activities is held.

In a timely petition for rehearing, Princeton urged that this interpretation brought the New Jersey Constitution into direct conflict with the U.S. Constitution in that, unlike a governmental entity, Princeton has expressive rights guaranteed to it by the First Amendment through the Fourteenth Amendment. Princeton distinguished *Prune Yard,* upon which the court had relied, by pointing out that unlike the shopping center in *Prune Yard,* the University uses its property for exercising its expressive rights. Princeton's petition for rehearing was denied without opinion. (App. 70a).

THE QUESTION PRESENTED IS SUBSTANTIAL

I. *In contravention of the First, Fifth and Fourteenth Amendments, the decision below denies the freedom of Princeton University and other private institutions to pursue academic objectives without state interference.*

At stake here is the ancient right of a university community to determine how its educational philosophy may best be implemented. The court below has mistakenly arrogated to itself that right. The court's decision, or any other assertion by state authority that interferes with exercise of that right by Princeton or other private universities, raises a fundamental and substantial question under the First Amendment. And it necessarily involves the courts in making forbidden judgments as to the content of expressive activity.

This case does not involve the rights of the faculty, students, employees or other members of the Princeton Univer-

sity community to engage in expressive activity on University property. It involves, purely and simply, the right of strangers with no University connection to use Princeton's property for their own expressive purposes.

The purpose of a private educational institution is research and education—to deal with ideas and concepts from whatever viewpoint, doctrine, cause or perspective it chooses. It may educate its students with the purpose of indoctrination in virtually any set of beliefs it espouses—popular or unpopular, reasonable or unreasonable. It may, as does Princeton University, regard education in a catholic sense of exposure to widely differing and conflicting viewpoints. Or it may seek to train people to a particular—even eccentric—viewpoint. But at either extreme, the institution's choice is totally protected by the U.S. Constitution from either perfidious or benign governmental interference, direction or control. The choice to create a liberal educational atmosphere, the choice to espouse a particular cause or doctrine, even the choice not to espouse particular views, are all exercises of First Amendment rights, equally protected by the Fourteenth Amendment from state imposed standards.

The court below focused its attention on Princeton University as a property owner rather than as a private university. It thus chose to ignore the protection accorded academic freedom "as a special concern of the First Amendment"[3] and failed to focus on the fact that the purpose of the property comprising a university campus is at bottom simply to promote the university's own educational viewpoint (a First Amendment right). Clearly use of the property may be regulated by exercises of state police power. But that regulation must, we submit, be neutral from a First Amendment perspective. Just as the

[3] *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978). At no point does the court below acknowledge or refer to Princeton's First Amendment rights, though it necessarily decides that those rights should be rejected in favor of appellee's state rights. It does recognize that academic freedom is involved and acknowledges that "private colleges and universities *must be accorded* a generous measure of autonomy and self-governance." (App. 31a) (emphasis added).

university cannot claim its academic freedom as a shield against state rules concerning health, safety and like matters, the state cannot use its police powers to control in any way the intellectual activities of the university.

The court below concluded that the state constitution requires Princeton to permit the use of its facilities by outsiders, "subject to suitable restrictions, [for] the reasonable exercise . . . of the constitutional freedoms of speech and assembly". What is "reasonable" or "suitable," according to the court, varies from case to case, depending upon the "primary use" of the property, "the extent and nature of the public's invitation to use the property," and whether "the purpose of the expressional activity" is in any way "discordant" with the private and public use of the property. (App. 27a-29a). This broad exercise of the police power was assertedly justified by the state's general interest in promoting expressive activity.

This implementation of state policy runs afoul of the U.S. Constitution in two ways. First, where the property is used by the owner itself for educational or other expressive purposes, requiring the property owner to permit others to use its property to promote ideas or beliefs which may be inconsistent with its own both violates its First Amendment protection from governmental interference[4] and diminishes the value of the property in its hands without compensation. This case differs from *Prune Yard* precisely because the property owner here has devoted its property to its own expressive uses. Thus, the issue is not simply whether the property owner may or may not be identified with the views expressed on its property by others but whether it must dedicate its property to expressive uses by others which, *in its opinion*,[5] are incompatible with its own educational purposes.

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[4] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), discussed below at pp. 13-14.

[5] " 'It is the business *of a university* to promote that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine *for itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

Second, the court below compounded rather than cured this vice when it held that the court, not the property owner, is the judge of what expressive activity by strangers is or is not compatible with a university's use of its property. That determination unavoidably thrusts New Jersey courts into the constitutionally impermissible role of passing judgment on the content of expressive activity.

In determining whether a private university is obligated by state law to honor speech and assembly rights of members of the general public, no court can possibly avoid judgments as to the content of the speech itself in relation to the academic purposes of the institution. The court below certainly made those judgments. Obviously, the determination of the relationship between the primary use of property and the purpose of the expressive activity necessarily involves qualitative judgments. A primary purpose of a Catholic university and a primary use of its physical facilities may be to instruct in the Catholic religion. Presumably it may extend an invitation to the general public to visit its campus so long as no speech or activity offensive to its religious beliefs takes place, and it may exclude those who do not abide by the rule. Who is the judge of whether a particular expression is sufficiently offensive to that school's philosophy to be properly banned on its campus? The court below said that decision is for the New Jersey courts. It failed to appreciate that the First Amendment prohibits government from making that decision.

Where private property is primarily used to promote private educational, ideological or religious objectives, the right to decide what is or is not compatible with those objectives is as much a First Amendment right as is formulating the objectives in the first place. How can it possibly be otherwise? Yet the court below denied that right to Princeton University when it concluded that:

> "defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes." (App. 30a).

No governmental agency can claim a competence to interpret what is or is not compatible with Princeton's educational objectives without intruding upon Princeton's First Amendment right to determine, for itself, without governmental interference, those objectives, their meaning and how they are to be served.

" '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 520 (1976), quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Yet the test established in this case by the court below forces courts to examine the content of Princeton's educational objectives and the content of defendant's political material. Those judgments "above all else" are prohibited to government by the First Amendment.

II. *The decision below discourages all private universities and other institutions in New Jersey from using property owned by them to educate or persuade members of the general public to particular viewpoints.*

A state may in appropriate circumstances exercise its authority in aid of expressive activity by subjecting private property owners to neutral governmental standards as to the speech of persons on their premises. That is the holding of *PruneYard* in the context of shopping centers. And other comparable situations—such as privately owned residential communities—might well justify a state's curtailing private abridgment of expressive activity.

One can reasonably—even persuasively—argue that shopping centers increasingly are replacing downtown shopping districts and that private residential communities are less accessible than the residential districts of a town.[6] Traditional public

[6] The First Amendment protects expressive activities from private abridgment in company towns, *Marsh v. Alabama*, 326 U.S. 501 (1946), but not in shopping centers, *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976) (overruling *Amalgamated Food*

forums of communication are thus being significantly replaced by privately owned equivalents, making communication with the general public more difficult. In the interest of maintaining open and inexpensive communication channels, a state may impose neutral governmental standards on the private owners of property used as a shopping center, putting them in the shoes of government and allowing them to limit expressive activity only through reasonable time, place and manner regulations. This was the approach of the California Supreme Court in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

The approach of the court below is grounded on a radically different state policy. The decision does not simply affect traditional public forums which today are privately owned. Here, *all* owners of private property to which the general public is for any purpose invited are subjected to some measure of constitutional obligation to permit expressive activity by members of the general public. The all-encompassing scope and consequent vagueness of the court's "multifaceted test" (App. 27a) makes its bite uncertain in any given case. The risk that the private owner may be cast in a neutral governmental role with respect to the expressive activity of strangers can be minimized by property owners only by minimizing all public access to the premises involved.

Where property is used as a shopping center, the owner cannot avoid inviting the general public, whether or not that invitation subjects it to a state constitutional obligation to permit expressive activity on the premises. But where the property involved is used for educational, religious or ideological purposes, that alternative may be more practical. Such institutions must choose between opening their property to the general public—thereby risking judicial scrutiny of their pur-

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Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)); *see Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Hudgens* did, however, suggest that state (or federal) law might, in appropriate circumstances, protect certain expressive activities from private abridgment even if the First Amendment did not. 424 U.S. at 513. *PruneYard Shopping Center v. Robins, supra*, followed this suggestion, again in a shopping center context.

poses to determine what expressive activity by others they must permit—or, insofar as feasible, excluding the general public in order to avoid that risk.

The extent to which particular private institutions can forego invitations to the general public to use their property for limited purposes will vary. But many private universities and colleges could elect to close their campuses and exclude the public from their libraries, lectures, dramatic performances, concerts—even their athletic events—rather than to subject their educational philosophies and their rules about expressive activity to judicial review. To the extent they do so, the decision below has effectively chilled their opportunity to communicate views to the general public and the general public's opportunity to learn. That chilling effect will remain until this Court resolves the constitutional question presented.

III. *The decision below misunderstands this Court's decision in* PruneYard *and, if allowed to stand, could encourage other states with constitutional provisions similar to those of New Jersey to arrive at similar conclusions.*

PruneYard Shopping Center v. Robins, supra, holds that the fact that the First Amendment does not itself protect expressive activity in a privately owned shopping center does not preclude states from doing so. A state may provide greater protection than the First Amendment to expressive activity within its borders; it may not provide less.

In a shopping center context, restricting private abridgment of speech undoubtedly promotes expressive activity. Shopping centers provide convenient and inexpensive means for communicating with thousands of citizens and have in varying degrees replaced downtown shopping streets as public forums. The state interest in preserving such a channel of communication is clear. And the cost and inconvenience to the property owner is not substantial enough to amount to a "taking" without compensation in violation of the Fifth and Fourteenth Amendments.

The property owner in *PruneYard* also raised a First Amendment claim which was rejected by this Court. *Id.* at 64 L.Ed.2d 754-56. While the property obviously was not used for any First Amendment purpose of the owner, he contended that requiring him to permit expressive activity by others was equivalent to the government's compelling him to convey messages. This Court found that argument inapposite in a shopping center context on the ground that the owner was not being compelled to convey any message nor would the general public associate the owner with any particular message conveyed.

Princeton University is not a shopping center catering to thousands of customers daily. Its business is not business, but ideas. Its interest, and its constitutionally protected right, is in establishing its own standards for the ideas which can be expressed on its property, by whom, and under what circumstances.

The First Amendment right of a private institution to control in virtually every respect the views it espouses without governmental intervention is confirmed by *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). As a newspaper, the *Miami Herald* enjoyed explicit First Amendment rights, but the Florida legislature believed that the political process would be enhanced if political candidates were given the right to reply to press criticism. It was "vigorously argue[d] that government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 247-48. The increasing power of the press—and the political need to dilute that power by providing greater access—were urged as justification for the statute, which was said to be aimed at implementing more effectively the policies underlying the First Amendment. This Court responded:

> "However much validity may be found in these arguments, at each point the implementation of a remedy *such as an enforceable right of access* necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a

confrontation with the express provisions of the First Amendment. . . ." *Id.* at 254 (emphasis added, footnote omitted).

Accordingly, this Court rejected government-enforced access to the press.

The case is instructive in two respects. First, this Court did not reach its conclusion by balancing property rights against rights of free expression, although property rights of the *Miami Herald* were clearly involved. Second, though the legislative purpose was to foster opportunities for the free expression of diverse views, this Court concluded:

> "Even if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper . . . whether fair or unfair . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258 (footnote omitted).

The editorial choices of the editors—"whether fair or unfair"—were not subject to a governmental test of "reasonableness", nor were the procedures by which those choices were made. Likewise, when Princeton University—exercising the traditional academic freedom of a private university—chooses what to hear from strangers on its campus under what circumstances, that choice cannot constitutionally be subject to governmental regulation or requirements of reasonableness.

Like California and New Jersey, most states have constitutional free speech guarantees which use language creating an affirmative right, rather than simply a restraint on govern-

mental interference.[7] Thus, it is open to those states to follow New Jersey in imposing broad obligations on private colleges and universities, unless this Court limits New Jersey's open-ended and mistaken interpretation of *Prune Yard.*

As the decision below demonstrates, there are risks to expressive freedom from too-expansive governmental efforts to promote it. State government is not, under *Prune Yard,* permitted to expand the expressive freedom of appellee at the cost of Princeton University's substantial First Amendment rights. The fact that this Court did not find California's rule to interfere with the First Amendment rights of the PruneYard's owner surely rests on the insubstantial nature of those rights in the context of a shopping center, to which the general public is necessarily invited, which is devoted to commercial—not expressive—purposes, and which replaces traditional public forums. Surely the capacity of states to prevent private abridgment of expressive activity on private property is limited to those factual situations where a substantial need can be shown[8] and where the expressive rights of the property owner itself are not thereby diminished. A state may not promote the expressive rights of some at the cost of curtailing those rights in others.

The ability of an owner of property devoted to educational, religious or ideological purposes to be selective in its invitees and to exclude those who, in its judgment, do not contribute to its educational or ideological purposes is a fundamental right protected from state interference by the First and Fifth Amendments, through the Fourteenth. Where the property right is used in aid of the expressive right, the U.S. Constitution protects both rights.

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[7] *See* Note, *Private Abridgment of Speech and the State Constitutions,* 90 Yale L. J. 165, 177-88 (1980).

[8] *Cf. Robins v. Pruneyard Shopping Center, supra* at 592 P.2d 345, 347. The decision below, in contrast, was not based on any finding that traditional avenues of expression had been supplanted. Indeed, the supreme court expressly noted that numerous public areas near the Princeton campus furnished ample means for the dissemination of information, views and ideas. (App. 14a).

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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March 17, 1981.

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SUPREME COURT OF NEW JERSEY
A-100 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
CHRIS SCHMID,
Defendant-Appellant.

Argued February 4, 1980—Decided November 25, 1980
On Certification to the Superior Court,
Law Division.

The opinion of the Court was delivered by HANDLER, J.

While distributing political literature on the campus of Princeton University, defendant Chris Schmid, a member of the United States Labor Party, was arrested and charged by the University with trespass upon private property. He was subsequently convicted under the State's penal trespass statute. On this appeal he challenges the conviction on the grounds that it stems from a violation of his federal and state constitutional rights to freedom of speech and assembly.

I

On April 5, 1978, Chris Schmid[1] was distributing and selling political materials on the main campus of Princeton University, a private, non-profit institution of higher education located in the Borough of Princeton, New Jersey. These materials dealt with the City of Newark mayoral campaign and with the United States Labor Party in general. Schmid was not a student at Princeton University nor was the Labor Party a university-affiliated or campus-based organization. On certain

[1] Another Labor Party member, Stephen Komm, was assisting Schmid in the on-campus distribution and sale of materials. Komm also was arrested for trespass, but the charges against him were dismissed in municipal court.

previous occasions members of the Labor Party had unsuccessfully sought to obtain University permission to distribute and sell political materials on campus. On this particular occasion in April 1978, however, no such permission was either sought or received.

Under the University regulations then in effect, permission was a prerequisite for the on-campus distribution of materials by off-campus organizations. No such permission was required, however, for the same activity by a university-affiliated organization or by Princeton students. The regulatory language pertaining to off-campus organizations stated in part:

> Demonstrations and the distribution of leaflets, statements, or petitions . . . are permitted on the campus unless, or until, they disrupt regular essential operations of the University or significantly infringe on the rights of others. On the same grounds, the campus is open to speakers whom students, faculty, or staff wish to hear, and to recruiters for agencies and organizations in whom students or faculty have an interest. [University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1976.]

These regulations further provided that no solicitation of either sales or charitable contributions was to be permitted on campus without the express authorization of the appropriate University officials. Moreover, door-to-door political or charitable solicitation was generally prohibited. *Ibid.* The University revised these regulations in 1979.[2]

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[2] The revised regulations now read in pertinent part as follows:

REGULATIONS GOVERNING SOLICITATION (INCLUDING COMMERCIAL SALES, FUNDRAISING, AND DISTRIBUTION OF LITERATURE) BY OFF-CAMPUS INDIVIDUALS OR ORGANIZATIONS

No individual or organization may distribute literature, advertise, or otherwise solicit customers, seek donations, or make sales on campus without the express authorization of the Office of the Dean of Student Affairs.

COMMERCIAL SALES. The Office of the Dean of Student Affairs may grant permission for solicitations and sales by off-campus

Schmid stipulated that he had been aware in April 1978 that the existing University policy was against allowing "per-

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business concerns only when specifically requested to do so by a recognized University students [*sic*], faculty, or employee organization. Such permission, when granted, will be subject to such limitations as the Dean of Student Affairs may prescribe.

CHARITABLE, POLITICAL, OR RELIGIOUS SOLICITATION. As a general rule, representatives of off-campus political, religious, and charitable groups will not be permitted to solicit on campus. However, individuals acting on behalf of candidates for public office or of *bona fide* political or religious organizations may obtain permission to sell or distribute their political or religious literature under the following guidelines:

1. Non-members of the University community who are acting on behalf of candidates for public office or of *bona fide* political or religious organizations, and who wish to seek permission to distribute and/or sell political and religious literature on the campus should apply to the Office of the Dean of Student Affairs between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

2. In choosing among the six sites where political and religious literature may be sold or distributed which were recommended by the Council of the Princeton University Community preference will be given to three locations: the area adjacent to the Student Center (on the Library side), the area surrounding Alexander Hall, and the area around the University Store.

3. Permission for the sale or distribution of political and religious literature may be granted only for the hours between 9:00 a.m. and 5:00 p.m. seven days a week.

4. The number of persons, who, at any one time, will be permitted to sell or distribute literature for any particular candidate or group is limited to one or two at any given location, and to five or six on the campus as a whole.

5. The number of occasions on which candidates or groups will be permitted to sell or distribute literature will be limited normally to six visits during a given month. In special situations, such as an approaching election, more frequent visits may be permitted.

6. The total number of people distributing or selling literature at any one location on campus will be limited. When several groups wish to distribute literature at a particular location, in accordance with general University policy, preference in use of campus facilities will be given to members of the Univer-

sons not connected with the University to enter campus uninvited and without sponsorship for the purpose of soliciting support or contributions." He had, in fact, previously been told on February 15, 1978 that his presence and activity on campus without permission were "forbidden" and that he "was subject to arrest for trespassing if he entered on campus to solicit again [without University permission]."

Schmid was arrested for trespass on University property on the day in question by a member of the Princeton University Security Department and charged as a disorderly person under N.J.S.A. 2A:170-31.[3] He was convicted of trespass in Princeton

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sity community. In acting on requests from members of outside political or religious groups and representatives of candidates, individuals who are sponsored by members of the University community will be preferred.

7. Harassment of members of the University community by those selling or distributing literature, or sale or distribution outside of the hours or locations for which permission has been granted, will be cause for the immediate revocation of permission for the sale or distribution of literature by those involved.

8. Decisions regarding requests under these guidelines will need to take into account both any special circumstances that may relate to University activities and the burden that permission to sell or distribute political or religious literature may place on the University's security forces and administrative staffs.

[University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1979).

[3] That statute provided in pertinent part that

[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. [N.J.S.A. 2A:170-31.]

The offense covered by that statute, repealed by L. 1978, c. 95, § 2C:98-2 (effective September 1, 1979), is now contained in the New Jersey Code of Criminal Justice as N.J.S.A. 2C:18-3 (L. 1978, c. 95, § 2C:18-3, effective September 1, 1979). The correct statute to be applied here, of course, is N.J.S.A. 2A:170-31, which was in effect at the time of the alleged offense. See N.J.S.A. 2C:1-1(b).

Borough Municipal Court on October 20, 1978 and fined $15 plus $10 costs. On February 20, 1979, following a trial *de novo* in Superior Court, Law Division, pursuant to R. 3:23-8, Schmid was again found guilty of trespass and the same monetary penalty was reimposed. While defendant's appeal was pending in the Appellate Division, this Court directly certified the case under R. 2:12-1. 81 N.J. 344, 407 A.2d 1218 (1979). At the Court's invitation, Princeton University intervened in this appeal. The Association of Independent Colleges and Universities in New Jersey also filed an *amicus curiae* brief with this Court.

Defendant contends on this appeal that his trespass conviction offends both the federal and State Constitutions. He specifically asserts that his conduct—distributing political literature on the main campus of Princeton University—constituted an exercise of his freedoms of speech and assembly, an exercise protected both by the First Amendment to the United States Constitution and by Article I, paragraphs 6 and 18 of the New Jersey Constitution; he maintains that the University was thus constitutionally obligated to permit this activity on its campus. In opposition, the State and the University contend that defendant's conduct encroached unlawfully upon legitimate and protectable private property rights. They argue that the University as a private entity had not undertaken state governmental action and had not invited or made a public use of its property sufficient to subject it to the strictures of the speech and assembly guarantees under either the federal or the State constitution. For these reasons, they urge that the University, in prosecuting Schmid for trespass upon private property, did not violate his individual constitutional rights.

We now address the respective federal and State constitutional issues framed by this appeal.

II

Defendant asserts initially that his conviction in this case violated his rights under the First Amendment to the United States Constitution. The First Amendment was designed by its

framers to foster unfettered discussion and free dissemination of opinion dealing with matters of public interest and governmental affairs. *Mills v. Alabama*, 384 U.S. 214, 218-219, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484, 488 (1966); *State v. Miller*, 83 N.J. 402, 412, 416 A.2d 821 (1980). It embraces the freedom to distribute information and materials to all citizens, a freedom "clearly vital to the preservation of a free society." *Martin v. Struthers*, 319 U.S. 141, 146-147, 63 S.Ct. 862, 864-865, 87 L.Ed. 1313, 1319 (1943); see *Lovell v. Griffin*, 303 U.S. 444, 450-451, 58 S.Ct. 666, 668-669, 82 L.Ed. 949, 953 (1938). The guarantees of the First Amendment are effectuated against potential state interference through the Fourteenth Amendment by limiting the extent to which states can restrict individuals in the exercise of rights of speech and assembly. See, *e.g., Schneider v. State*, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155, 164 (1939). The First Amendment, however, does not similarly protect rights of speech and assembly against interference or impairment by private individuals. The Amendment imposes no limitations upon "the owner of private property used nondiscriminatorily for private purposes only," even though such use may trench upon the speech and assembly activities of other persons. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 2228, 33 L.Ed.2d 131, 142 (1972).

It is clear that public colleges and universities, as instrumentalities of state government, are not beyond the reach of the First Amendment. *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266, 279 (1972). A public college or university, created or controlled by the state itself, is an arm of state government and, thus, by definition, implicates state action. *Powe v. Miles*, 407 F.2d 73, 82 (2 Cir. 1968); see *American Future Systems, Inc. v. Pennsylvania State Univ.*, 618 F.2d 252, 255 (3 Cir. 1980).

A private college or university, however, stands upon a different footing in relationship to the state. Such an institution is not the creature or instrument of state government. Even though such an institution may conduct itself identically to its state-operated counterparts and, in terms of educational pur-

poses and activities, may be virtually indistinguishable from a public institution, see McKay, "The Student As Private Citizen," 45 *Denver L.J.* 558, 560 (1968), a private college or university does not thereby either operate under or exercise the authority of state government. Hence, the state nexus requirement that triggers the application of the First Amendment is not readily met in the case of a private educational institution. See, *e.g., Grafton v. Brooklyn Law School,* 478 F.2d 1137, 1143 (2 Cir. 1973); *Blackburn v. Fisk Univ.,* 443 F.2d 121, 123 (6 Cir. 1971); see generally Annot., "Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.A. § 1983," 37 A.L.R.Fed. 601 (1978).

Notwithstanding the primary thrust of the First Amendment against state governmental interference with expressional freedoms, the guarantees of this Amendment may under appropriate conditions be invoked against nongovernmental bodies. In particular settings, private entities, including educational institutions, may so impact upon the public or share enough of the essential features of governmental bodies as to be engaged functionally in "state action" for First Amendment purposes. The more focused inquiry therefore must be turned to those circumstances that can subject an entity of essentially nongovernmental or private character to the requirements imposed by the First Amendment.

One test of such state action involves the presence of an interdependent or symbiotic relationship between the private entity and the state government. This standard was utilized in *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); in which the Supreme Court held that a privately-owned restaurant which leased premises in a government-owned and government-maintained parking garage was subject to the Equal Protection Clause of the Fourteenth Amendment; the restaurant thus could not refuse to serve blacks. The Court stressed that the parking facility was essentially a government building engaged in a governmental purpose and that the State and the restaurant mutually benefit-

ed from their "joint participation" in the operation. 365 U.S. 723-726, 81 S.Ct. at 860-862, 6 L.Ed.2d at 51-52.

Another basis for determining the existence of state action is the extent of direct governmental regulation of the private entity.[4] This standard was applied in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 463, 72 S.Ct. 813, 821, 96 L.Ed. 1068, 1077 (1952), wherein the Supreme Court held that the First and Fifth Amendments to the Federal Constitution were applicable to a policy decision made by a private transit company operating in the heavily-regulated field of public transportation because that decision was subject to approval by a governmental agency. The governmental regulation or control standard, however, is fairly difficult to administer as a means for positing state action. The Supreme Court has stated that the mere fact that a business is subject to extensive state regulation will not in and of itself convert the actions of that business entity into state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477, 483-484 (1974). There must be demonstated a "sufficiently close nexus" between the state regulation and the allegedly unconstitutional actions of the regulated business entity before it can be said that those actions emanate from or can be attributed to state government. *Id.* at 351, 95 S.Ct. at 453, 42 L.Ed.2d at 484. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171, 92 S.Ct. 1965, 1970, 32 L.Ed.2d 627, 636-637 (1972) (Equal Protection Clause of Fourteenth Amendment did not apply to private club because state's regulation of club's liquor license did not directly involve state in club's racially-exclusive practices).

Both of these approaches for ascertaining state action have been followed in challenges to the actions of private colleges or

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[4] There appears to be some confusion as to whether this second basis for state action has totally supplanted the earlier *Burton* symbiotic relationship test. Some courts, in light of *Jackson v. Metropolitan Edison*, 419 U.S. 345, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974), appear to have adopted the view that the *Burton* test is no longer viable. See *Greene v. Johns Hopkins Univ.*, 469 F. Supp. 187, 194-195 (D.Md. 1979) (discussing this confusion).

universities as violative of First Amendment rights. Among the factors most often marshaled to show state action are that the institution received government funds, that the institution as performing a governmental function by providing education, that it was state-accredited or state-chartered or was otherwise highly regulated by the state, that the college derived economic benefit from tax exemptions, that it indirectly enforced governmental laws, or, in some instances, that the college had been built on formerly public lands. See, *e.g., Blackburn v. Fisk Univ., supra,* 443 F.2d at 122-124. See also, Cohen, "The Private-Public Legal Aspects of Institutions of Higher Education," 45 *Denver L.J.* 643, 645-647 (1968); Schubert, "State Action and the Private University," 24 *Rutgers L.Rev.* 323, 334-347 (1970). For the most part, however, such challenges have failed. See *Cannon v. Univ. of Chicago,* 559 F.2d 1063 (7 Cir. 1977), rev'd on other grounds, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *Krohn v. Harvard Law School,* 552 F.2d 21, 24 (1 Cir. 1977); *Greenya v. George Washington Univ.,* 512 F.2d 556, 559-562 (D.C. Cir. 1975), *cert. den.,* 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975); *Blouin v. Loyola Univ.,* 506 F.2d 20, 22 (5 Cir. 1975) (*per curiam*); *Wahba v. New York Univ.,* 492 F.2d 96, 101 (2 Cir. 1974); *cert. den.,* 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974); *Blackburn v. Fisk Univ., supra,* 443 F.2d at 123; *Browns v. Mitchell,* 409 F.2d 593, 594-595 (10 Cir. 1969); *Greene v. Johns Hopkins Univ.,* 469 F. Supp. 187, 196-198 (D. Md. 1979); *Huff v. Notre Dame High School of West Haven,* 456 F. Supp. 1145, 1147-1149 (D. Conn. 1978); *Pendrell v. Chatham College,* 370 F. Supp. 494, 499 (W.D. Pa. 1974); *Furumoto v. Lyman,* 362 F. Supp. 1267, 1276-1280 (N.D. Cal. 1973); *Grossner v. Trustees of Columbia Univ.,* 287 F. Supp. 535, 546-549 (S.D.N.Y. 1968); *contra, Braden v. Univ. of Pittsburgh,* 552 F.2d 948, 961 (3 Cir. 1977); *Rackin v. University of Pennsylvania,* 386 F. Supp. 992 (D.C. Pa. 1974).[5]

[5] These cases, evincing the difficulty of positing "state action" to private educational institutions under the First Amendment, generally have dealt with the internal affairs of the particular institutions, such as faculty employment and student discipline, and not with the conduct of members of the general public *vis-a-vis* the institutions, as

The record reveals that Princeton University, though privately owned and controlled, is involved in a continuous relationship with the state. The University is a state-accredited educational institution; it participates in and receives, as do other public and private educational institutions, the advantages of certain State programs, *e.g., The New Jersey Educational Facilities Authority Law,* N.J.S.A. 18A:72A-1 *et seq.* (au-

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here. It may be that such a distinction would, in an appropriate case, warrant a different and less rigorous standard as to what constitutes "state action" for First Amendment purposes.

In such cases, where the rights of the general public are at stake, the importance attached to the free exercise of First Amendment rights could be a potent counterpoise against the need for a private university to retain control of its own internal affairs. See *Weise v. Syracuse University,* 522 F.2d 397, 406 (2 Cir. 1975)("a consideration of whether there is state action necessarily entails a balancing process"). *Cf., e.g., Williams v. Howard Univ.,* 528 F.2d 658, 660 (D.C. Cir. 1976), *cert. den.* 429 U.S. 850, 97 S.Ct. 138, 50 L.Ed.2d 123 (1976); *Spark v. Catholic Univ. of America,* 510 F.2d 1277, 1281-1282 (D.C. Cir. 1975) (*per curiam*); *Jackson v. Statler Foundation,* 496 F.2d 623, 629 (2 Cir. 1974), *cert. den.* 420 U.S. 927, 95 S. Ct. 1124, 43 L.Ed.2d 397 (1975) (These cases indicate that when racial discrimination has been assertedly practiced by a private entity contrary to the Equal Protection Clause of the Fourteenth Amendment, a less exacting test is appropriate for determining the presence of "state action"). The balancing of the interests of the public in expressional freedoms and the importance of the autonomy and independence of private educational institutions is addressed later in our opinion. See discussion *infra* at 566, 567, at 631-632.

Additionally, the differences between public and private educational institutions may, in many situations, be negligible. See McKay, "The Student As Private Citizen," 45 *Denver L.J.* 558, 560 (1968). In such cases, the same First Amendment protections might conceivably be required. *Cf. Marsh v. Alabama,* 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946) (private company town subject to first Amendment where performing same functions as municipality). Given the importance attached to higher education and the significant social contributions of private educational institutions, a wide disparity between the nature and scope of permitted speech at private universities and that which must be allowed at public universities would seem anomalous and undesirable. In light of the decision reached in this case, however, we need do no more than note here these added lines of analysis.

thority created to issue bonds for capital improvements and new construction on the campuses both of public and private post-secondary educational institutions); *The Higher Education Assistance Authority Law*, N.J.S.A. 18A:72-1 *et seq.* (creating fund to provide loans to New Jersey students attending public or private post-secondary educational institutions). Its property and buildings on the central campus, with the exception of its ice skating and hockey facility and its campus parking lots, are tax-exempt. The University also receives state-budgeted funds through *The Independent College and University Assistance Act*, N.J.S.A. 18A:72B-15 *et seq.* In addition, acording to the stipulations of the parties, the University Security Department, some of whose employees are deputized to make arrests under the laws of New Jersey, is primarily responsible for providing security services for the entire University community.

Nonetheless, this congeries of facts does not equate with state action on the part of Princeton University. See, *e.g.*, *Blackburn v. Fisk Univ.*, *supra*, 443 F.2d at 122-124. Princeton University is, indisputably, predominantly private, unregulated and autonomous in its character and functioning as an institution of higher education. The interface between the University and the State is not so extensive as to demonstrate a joint and mutual participation in higher education or to establish an interdependent or symbiotic relationship between the two in the field of education.

Moreover, the degree of State regulation does not evince a "close nexus" between the State and Princeton University's policies, particularly with regard to the public's access to the University campus and facilities and, even more particularly, with regard to either the distribution of political literature or other expressional activities on University property. Furthermore, the resort by Princeton University to the State's trespass laws to protect its own rights of property does not, as suggested in the separate opinion of Justice Pashman, *post* at 573, at 635 constitute state action for First Amendment purposes. In the absence of a protectable First Amendment right in the individual, the property owner's recourse to appropriate and otherwise

neutral penal sanctions to protect its legitimate interests does not constitute action by State nor clothe the property owner with a state identity for First Amendment purposes. See *Bell v. Maryland*, 378 U.S. 226, 327-333, 84 S.Ct. 1814, 1836-1872, 12 L.Ed.2d 822, 856-859 (1964) (Black, J., dissenting).[6]

Although Princeton University is thus not subject to First Amendment obligations by virtue of a joint relationship with or direct regulation by the State, there remains to be considered still another standard for determining First Amendment applicability, *viz.*, the "public function doctrine." See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185, 195 (1978). Even though a private entity is not engaged in "state action," it may nevertheless be required to honor First Amendment rights if its property is sufficiently devoted to public uses. See *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278, 90 L.Ed. 265, 268 (1946). "The more an owner for his advantage opens up his property to use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.*, 326 U.S. at 506, 66 S.Ct. at 278, 90 L.Ed. at 268.

A company-owned town which possessed all of the characteristics of a municipality, providing full access to the public to all of its facilities including its shopping district, was held to be subject to the strictures of the First Amendment. *Id.* at 503,

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[6] To the extent *Shelley v. Kramer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948) might assertedly support the notion that the invocation of state authority which in and of itself effectuates racial discrimination constitutes state action under the Fourteenth Amendment, it has been noted that several cases have recognized the existence of a double "state action" standard, *i.e.*, "a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims". *Jackson v. Statler Foundation*, 496 F.2d 623 (2 Cir. 1974). See also, *e.g.*, *Greenya v. George Washington Univ.*, 512 F.2d 556, 560 (D.C. Cir. 1975), *cert. den.*, 423 U.S. 995, 96 S. Ct. 422, 46 L.Ed.2d 369 (1975); *Aasum v. Good Samaritan Hospital*, 542 F.2d 792, 794 (9 Cir. 1976). But see *contra*, *Isaacs v. Bd. of Trustees of Temple Univ.*, 385 F. Supp. 473, 485 n. 11 (E.D. Pa. 1974). See *supra* at 546 n.5, at 621 n.5.

508-509, 66 S.Ct. at 277, 280, 90 L.Ed. at 266-267, 270. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 317, 88 S.Ct. 1601, 1608, 20 L.Ed.2d 603, 611 (1968), the Supreme Court found "striking" similarities between a company town, as described in *Marsh v. Alabama, supra,* and a privately-owned shopping mall. Specifically noting the common sidewalks and parking areas and the invitation to the public to use the property, the Court held that it was a violation of the First Amendment to apply a trespass statute to union members picketing a non-unionized supermarket located in the privately-owned shopping mall. *Id.* at 322-323, 88 S.Ct. at 1610-1611, 20 L.Ed.2d at 614-615; see T. Emerson, *The System of Freedom of Expression* 307-310 (1970).

A different result was reached in *Lloyd Corp. v. Tanner, supra.* The majority of the Supreme Court in *Lloyd* held that a privately-owned shopping mall could bar the distribution of anti-war handbills on mall property. It distinguished *Logan Valley* on the ground that the subject matter of the handbills in *Lloyd* was unrelated to the shopping center's business. 407 U.S. at 564-565, 92 S.Ct. at 2227, 33 L.Ed.2d at 140. With respect to the public use of the property, the Court noted that the invitation for public use of the shopping mall was not "open ended" or for "any and all purposes." *Id.* at 565, 92 S.Ct. at 227, 33 L.Ed.2d at 140. It also found significance in the fact that there were adequate alternative means of communication, *i.e.*, that there were public areas directly outside the mall that were available for the distribution of the anti-war handbills. *Id.* at 566-567, 92 S.Ct. at 2227-2228, 33 L.Ed.2d at 141. The Court reinforced the *Lloyd* holding in *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), wherein it ruled that striking warehouse employees who sought to picket their employer's retail store located in a privately-owned shopping center were not protected under the First Amendment. A majority of the *Hudgens* Court supported the view that *Lloyd* effectively overruled and substantially constricted the reach of *Logan Valley.* See *Hudgens v. NLRB, supra,* 424 U.S. 523, 524, 535, 96 S.Ct. at 1038, 1039, 1044, 47

L.Ed.2d at 209, 210, 216. Very recently, in *Prune Yard Shopping Center v. Robins,* U.S. , 100 S.Ct. 2035, 2039-2041, 64 L.Ed.2d 741, 751-752 (discussed *infra* at 552, at 624), the Supreme Court recapitulated this judicial history and observed that the rationale of *Logan Valley* had been "substantially repudiated" by *Lloyd* and had been actually overruled by *Hudgens.*

While the Supreme Court has now indicated that the *Logan Valley* decision has been overruled, it did not reject or disapprove of *Lloyd Corp. v. Tanner,* (although the continued utility of *Lloyd* has been questioned. See concurring opinion of Justice Schreiber, *post* at 578-579, at 638-639).

If the *Lloyd* approach were applied in the present case, it would be difficult to conclude under the circumstances disclosed by the record that Princeton University is directly subject to First Amendment strictures. See generally, Note, "First Amendment and the Problem of Access to Migrant Labor Camps after *Lloyd Corp. v. Tanner,*" 61 *Cornell L.Rev.* 560, 578-580. For example, in assessing the availability of alternative means of communication, there are public streets, sidewalks, parking areas, and a train station immediately contiguous to Princeton University's main campus and most of its buildings and facilities; a major street with public sidewalks bisects the University campus. These numerous public areas apparently furnish to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as means for the dissemination and exchange of information views, and ideas.

Were we to concentrate upon the other aspects of the *Lloyd* standard (notwithstanding their precedential diminution as a result of *Hudgens*), those focusing upon the scope of the public's invitation and the nature of the expressional activities in relation to the use of private property, the applicability of the First Amendment is less clear. Arguably, there are a broad public invitation and wide use of University property that serve to encourage expressional rights and are conducive to the

educational goals of Princeton University. (See discussion *infra* at 564-566, at 630-632). Nevertheless, it must be recognized that the public uses and expressional activities that are permitted by the University are subordinate to its overall educational policies. In this sense, while the invitation to the public is broad, it is not truly "open-ended" or for "any and all purposes." *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 565, 92 S.Ct. at 227, 33 L.Ed.2d at 140. Therefore, although Princeton University's *raison d'etre* is more consonant with free speech and assembly principles than a shopping center's purposes might be, the attachment of First Amendment requirements to the University by virtue of the general public's permitted access to its property would still be problematic.

If we were to examine whether Princeton University has in the pervasive and all-inclusive sense of *Marsh v. Alabama, supra,* undertaken to act as a local government body, the applicability of the First Amendment remains doubtful. The nature of college community life as determined by Princeton University, even with its residential characteristics, would not seem to invest the University with the fundamental attributes of a government substitute or surrogate in the manner deemed critical for positing state action in *Marsh v. Alabama, supra.* (See discussion *supra* at 549, at 622). A private educational institution such as Princeton University involves essentially voluntary relationships between and among the institution and its students, faculty, employees, and other affiliated personnel, and the life and activities of the individual members of this community are directed and shaped by their shared educational goals and the institution's educational policies. The public's invitation to use college facilities is incident to the educational life of the institution and must comport and be integrated with its educational endeavors. It is dubious therefore whether Princeton can or should be regarded as a quasi-governmental enclave or the functional equivalent of a "company town," which has all of the characteristics of a municipality, for First Amendment purposes. *Powe v. Miles,* 407 F.2d 73, 80 (2 Cir. 1968); *McLeod v. College of Artesia,* 312 F. Supp. 498, 502

(D.N.M. 1970); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

In attempting to pull together these diverse strands of constitutional doctrine, it is apparent that First Amendment principles as applied to the owners of private property are still evolving. The precise question in this case has not been definitively resolved or even clearly foreshadowed by extant decisional authority. Furthermore, invoking First Amendment strictures against private property owners, as has been noted, necessarily engenders countervailing concerns for legitimate private property rights, *e.g.*, *PruneYard Shopping Center v. Robins, supra.* In this case, the difficulty of the decisional task and the uncertainty of its solution posed by this consideration are further compounded because the private property is an educational institution. Such institutions, in addition to their own protectable private property interests, are committed to the achievement of important societal educational objectives which are generally consistent with First Amendment purposes. While these purposes may temper the protections accorded private property, the legitimate and genuine property interests of educational institutions should not be denuded because of the apparent coincidence between the goals of higher education and the First Amendment.

We are thus confronted with strong crosscurrents of policy that must be navigated with extreme care in reaching any satisfactory resolution of the competing constitutional values under the First Amendment in this case. These concerns persuade us to stay our hand in attempting to decide the question of whether the First Amendment applies to Princeton University in the context of the present appeal. Defendant, moreover, has presented compelling alternative grounds for relief founded upon the State Constitution, which we now reach.

III

Defendant asserts that under the state Constitution he is afforded protection of his expressional rights even if it is not

clear that the First Amendment would serve to grant that protection. The United States Supreme Court has recently acknowledged in the most clear and unmistakable terms that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. *Prune Yard Shopping Center v. Robins, supra,* U.S. at , 100 S.Ct. at 2040, 64 L.Ed.2d at 752. The view that state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution has received frequent judicial expression. See, *e.g., Prune Yard Shopping Center v. Robins, supra,* U.S. , , 100 S.Ct. 2035, 2039-2040, 64 L.Ed.2d at 750, 752; *id.* at , 100 S.Ct. at 2046, 64 L.Ed.2d at 758 (Marshall, J., concurring); *Oregon v. Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575-576 (1975); *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730, 734 (1967); *Armstrong v. Egeler,* 563 F.2d 796, 801 (6 Cir. 1977); *Shiras v. Britt, Ark.,* 589 S.W.2d 18, 19 (Sup. Ct. 1979); *People v. Rucker,* 26 Cal.3d 368, 389-391, 605 P.2d 843, 856, 162 Cal. Rptr. 13, 26 (Sup. Ct. 1980); *People v. Privitera,* 23 Cal.3d 697, 710, 591 P.2d 919, 926, 153 Cal. Rptr. 431, 438 (Sup. Ct. 1979), *cert. den.,* 444 U.S. 949, 100 S.Ct. 419, 62 L.Ed.2d 318 (1979); *State v. Kaluna,* 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (Sup. Ct. 1974); *O'Connor v. Johnson,* 287 N.W.2d 400, 405 (Minn. Sup. Ct. 1979); *Keene Publishing Corp. v. Cheshire County Superior Court, N.H.,* 406 A.2d 137, 138 (Sup. Ct. 1979); *Cooper v. Morin,* 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1194, 424 N.Y.S.2d 168, 174 (Ct. App. 1979), *cert. den.,* U.S. , 100 S.Ct. 2965, 64 L.Ed.2d 840 (1980); *Westchester Rockland Newspapers, Inc. v. Leggett,* 48 N.Y.2d 430, 436, 442, 399 N.E.2d 518, 521, 525, 423 N.Y.S.2d 630, 634, 638 (Ct. App. 1979); *Sharrock v. Dell Buick-Cadillac, Inc.,* 45 N.Y.2d 152, 160-161, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39, 43-44 (Ct. App. 1978); *People v. Onofre,* 72 A.D.2d 268, 270, 424 N.Y.S.2d 566, 568 (App. Div. 1980);[7] see Brennan, "State

[7] This recent upsurge in cases demonstrating the increasing willingness of state courts to rest their decisions upon state constitutions as "adequate and independent state grounds," *Herb v. Pitcairn,* 324 U.S. 117, 125, 65 S. Ct. 459, 463, 89 L.Ed. 789, 794

Constitutions and the Protection of Individual Rights", 90 Harv. L. Rev. 489, 491, 495 (1977); Countryman, "The Role of a Bill of Rights in a Modern State Constitution: Why a State Bill of Rights?", 45 Wash. L. Rev. 454, 456-459, 470-474 (1970); Falk, "Foreword—The State Constitution: A More Than 'Adequate' Nonfederal Ground", 61 Cal. L. Rev. 273, 281-285 (1973); Force, "State 'Bills of Rights': A Case of Neglect and the Need for a Renaissance", 3 Valparaiso U.L. Rev. 125, 129, 142-143 (1969); Howard "State Courts and Constitutional Rights in the Day of the Burger Court", 62 Va. L. Rev. 873, 874-877, 910-911 (1976); Howard, "The Supreme Court and Federalism", in *The Courts: The Pendulum of Federalism* 49, 71-76 (Roscoe Pound—American Trial Lawyers Foundation 1979); Paulsen, "State Constitutions, State Courts and First Amendment Freedoms", 4 Vand. L. Rev. 620, 621 (1951); Project Report, "Toward an Activist Role for State Bills of Rights", 8 Harv. C.R.-C.L.L. Rev. 271, 285 (1973).

On numerous occasions our own courts have recognized the New Jersey Constitution to be an alternative and independent source of individual rights. See, *e.g.*, *Smith v. Penta*, 81 N.J. 65, 73-76, 405 A.2d 350 (1979); *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 177, 330 A.2d 1 (1974); *id.* at 193-194, 330 A.2d 1 (Pashman, J., dissenting). Mr. Justice Brennan in his oft-cited piece in 90 Harv. L. Rev., *supra*, at 499 drew support for this proposition from *State v. Johnson*, 68 N.J. 349, 353 n.2, 346 A.2d 66 (1975), wherein Justice Sullivan had observed that although the New Jersey constitutional provision relating to searches and seizures was identical to the federal Fourth Amendment provisions, "'we have the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning.'"

(1945), has been characterized as a "'phoenix-like resurrection of federalism'". Howard, "The Supreme Court and Federalism," *in The Courts: The Pendulum of Federalism* 49, 72 (Roscoe Pound —American Trial Lawyers Foundation 1979) (quoting Address by Justice Mosk, Bicentennial Conference, New York University School of Law, April 28, 1976); see also Mosk, "The New States' Rights," 10 *Cal. L. Enforcement* 81, 82 (1976).

The guarantees of our State Constitution have been found to extend to a panoply of rights deemed to be most essential to both the quality of individual life and the preservation of personal liberty. See, *e.g.*, *Levine v. Institutions & Agencies Dept. of N.J.*, 84 N.J. 234, 244-249, 258, 418 A.2d 229 (1980) (right to an education); *id.* at 273, 418 A.2d 229 (Pashman, J., dissenting); *State v. Ercolano*, 79 N.J. 25, 30, 34, 397 A.2d 1062 (1979) (privacy-based freedom from "unreasonable searches and seizures"); *State v. Slockbower*, 79 N.J. 1, 4 n.2, 397 A.2d 1050 (1979) (same); *State v. Tropea*, 78 N.J. 309, 313, n.2, 394 A.2d 355 (1978) (double jeopardy and fundamental fairness); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79, 389 A.2d 465 (1978) (equal protection); *State v. Saunders*, 75 N.J. 200, 216-217, 381 A.2d 333 (1977) (right of sexual privacy); *id.* at 224-225, 381 A.2d 333 (Schreiber, J. concurring); *In re Quinlan*, 70 N.J. 10, 19, 40-41, 51, 355 A.2d 647 (1976), *cert. den. sub nom. Garger v. New Jersey*, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976) (right of choice to terminate life-support systems as aspect of right of privacy); *State v. Johnson, supra*, 68 N.J. at 353, 346 A.2d 66 (freedom from "unreasonable searches and seizures"); *State v. Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (double jeopardy and fundamental fairness); *Robinson v. Cahill*, 62 N.J. 473, 482, 509, 303 A.2d 273 (1973), *cert. den. sub nom. Dickey v. Robinson*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973) (*Robinson I*) (right to an education); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-346, 294 A.2d 233 (1972) (right to vote); *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 191, 195-196, 175 A.2d 639 (1961) (right of employees to organize and bargain collectively); *State v. Hannah*, 171 N.J. Super. 325, 330, 408 A.2d 1349 (App. Div. 1979) (right to a public criminal trial inheres in the public); *Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 300-301, 343 A.2d 148 (Law Div. 1975) (freedom of the press); *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 306-307, 265 A.2d 404 (Ch. Div. 1970) (right to be free from racial discrimination); *cf. State v. Carpentieri*, 82 N.J. 546, 572-573, 414 A.2d 966 (1980) (Pashman, J., dissenting) (freedom from "unreasonable searches and seizures"). *Contra, Anderson v. Sills*, 143 N.J. Super. 432, 442, 363 A.2d 381 (Ch. Div. 1976). As Justice Schreiber pointed out in his concurring opinion in

State v. Saunders, supra, with respect to fundamental personal rights, "individuals have freedom to think, decide and act as they see fit[; t]his freedom is an aspect of their right of privacy" guaranteed by the New Jersey Constitution, N.J. Const. (1947), Art. I, par. 1, quite apart from the federal Constitution. 75 N.J. at 225, 381 A.2d 333.

Most recently, this Court recognized through Chief Justice Wilentz that freedom of the press, intimately associated with individual expressional and associational rights, is strongly protected under the State Constitution (N.J. Const. (1947), Art. I, par. 6), state statutory enactments (*e.g.*, N.J.S.A. 2A:84A-21 *et seq.* ("shield law")), and state decisional law. See *State* [*v.*] *Boiardo,* 83 N.J. 350, 353, 416 A.2d 793 (1980) (Boiardo II); *State v. Boiardo,* 82 N.J. 446, 458, 414 A.2d 14 (1980) (Boiardo I); *In re Farber,* 78 N.J. 259, 286-287, 394 A.2d 330 (Pashman, J., dissenting). The United States Supreme Court itself has acknowledged that the First Amendment, which implicates this important freedom, does not accord to it the degree of protection that may be available through state law. *Branzburg v. Hayes,* 408 U.S. 665, 706, 92 S.Ct. 2646, 2669, 33 L.Ed.2d 626, 654 (1972); see also, *e.g., Keene Publishing Corp. v. Cheshire County Superior Court, supra; Westchester Rockland Newspapers, Inc. v. Leggett, supra.*

A basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms, *viz.*:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . . [N.J. Const. (1947), Art. I, par. 6.]
>
> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. [N.J. Const. (1947), Art. I, par. 18.]

The constitutional pronouncements, more sweeping in scope than the language of the First Amendment,[8] were incorporated into the organic law of this State with the adoption of the 1844 Constitution. N.J. Const. (1844), Art. I, pars. 5 and 18. They were, however, directly derived from earlier sources, *e.g.*, the free speech provision was modeled after Article 7, Section 8 of the 1821 Constitution of the State of New York (now N.Y. Const. (1938), Art. I, § 8). Heckel, "The Bill of Rights" (Monograph), in 2 *Proceedings of the New Jersey Constitutional Convention of 1947*, 1336, 1344 (1951) (hereinafter Heckel, "Bill of Rights"); *id.* at 1357-1358. This early constitutional model itself has been recognized as constituting an independent source of protectable individual rights. See *Cooper v. Morin, supra,* 49 N.Y.2d at 79, 399 N.E.2d at 1194, 424 N.Y.S.2d at 174; *Westchester Rockland Newspapers, Inc. v. Leggett, supra,* 48 N.Y.2d at 436, 442, 399 N.E.2d at 521, 525, 423 N.Y.S.2d at 634, 638; *Sharrock v. Dell Buick-Cadillac, Inc., supra,* 45 N.Y.2d at 160-161, 379 N.E.2d at 1173, 408 N.Y.S.2d at 43-44.

Although our own courts have seldom been invited or required to view the New Jersey Constitution as a separate basis for delineating the scope of individual speech and assembly freedoms, the philosophy recognizing the importance of such rights has been frequently voiced. In a case decided last

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[8] Even if the language of the state constitutional and federal constitutional provisions were identical, this Court could give differing interpretations to the provisions. This option was noted by Justice Sullivan in *State v. Johnson,* 68 N.J. 349, 353, 346 A.2d 66 (1975). As Justice Mosk of the California Supreme Court has observed, "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *People v. Brisendine,* 13 Cal.3d 528, 550, 531 P.2d 1099, 1113, 119 *Cal. Rptr.* 315, 329 (S. Ct. 1975); see Note, "Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?", 8 *Loyola U.L.J.* 186, 192 (1976); see also Z. Chafee, *Free Speech in the United States* 5-6 (1941).

term dealing with such expressional rights in the context of municipal zoning restrictions, Justice Clifford observed as follows:

> [P]olitical speech . . . occupies a preferred position in our system of constitutionally-protected interests. [*State v. Miller*, 83 N.J. 402, 411, 416 A.2d 821 (1980).] Where political speech is involved, our tradition insists that government "allow the widest room for discussion, the narrowest range for its restriction". [*Id.* at 412, 416 A.2d 821 (citation omitted).]

See *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 277, 96 A.2d 519 (1953) (under the facts, there was a First Amendment violation in the denial of theatre license since "speech[, including the 'performance of play or show' (*id.* at 270, 96 A.2d 519),] is to be presumed to be protected speech and . . . the presumption is not the other way"); *State v. Butterworth*, 104 N.J.L. 579, 582, 142 A. 57 (E. & A. 1928) (in overturning the unlawful assembly convictions of striking workers, Court observed that "[t]hese constitutional mandates [the First Amendment and N.J. Const. (1844), Art. I, par. 18], being in favor of the liberty of the people, must be given the most liberal and comprehensive construction").

Our courts have also on occasion observed that the State Constitution serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. *Smith v. Penta, supra*, 81 N.J. at 74, 405 A.2d 350; *Gangemi v. Berry*, 25 N.J. 1, 8-9, 134 A.2d 1 (1957). Hence, the explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them. See 16A *Am. Jur. 2d, Constitutional Law*, § 439 at 208 (1979). It has been recognized that the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation. *Peper v. Princeton Univ. Bd. of Trustees, supra*, 77 N.J. at 76-77, 389 A.2d 465. "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence . . . ." *King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 177, 330 A.2d 1 (Hughes, C.J.); see *Robinson I, supra*, 62 N.J. at 513, 303 A.2d 273; *Booker v. Plainfield Bd. of Educ.*, 45 N.J. 161, 173-175, 214

A.2d 1 (1965). Furthermore, the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights. See *In re Quinlan, supra,* 70 N.J. at 19 n.1, 355 A.2d 647; *cf. Mt. Laurel v. Public Advocate of N.J.,* 83 N.J. 522, 535-536, 416 A.2d 886 (1980) (state statute creating Office of Public Advocate to enforce the rights of citizens as an aspect of the public interest is not unconstitutional). This constitutional imperative, applicable to the freedoms of speech and assembly, comports with the presumed intent of those who framed our present Constitution. See Heckel, "Bill of Rights", *supra* at 1344-1345, 1357-1358.

Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. It has been noted that in our interpretation of fundamental State constitutional rights, there are no constraints arising out of principles of federalism.[9] *Robinson I, supra,* 62 N.J. at 490, 303 A.2d 273. See also *King v. South Jersey Nat'l Bank, supra,* 66 N.J. at 192-193, 330 A.2d 1 (Pashman, J., dissenting) (citing *Cooper v. Nutley Sun Printing Co., supra,* 36 N.J. at 196-197, 175 A.2d 639; *Gray v. Serruto Builders, Inc., supra,* 110 N.J. Super. at 306-307, 265 A.2d 404; Countryman, "The Role of a Bill of Rights in a Modern State Constitution", *supra,* 45 Wash. L. Rev. at 473; Project Report, "Toward an Activist Role for State Bills of Rights", *supra* 8 Harv. C.R.-C.L.L. Rev. at 338 (analyzing N.J. Const. (1947), Art. I, par. 6)). Hence, federal requirements concerning "state action", founded primarily in the language of the Fourteenth Amendment and in principles of federal-state relations, do not have the same force when applied to state-based constitutional rights.

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[9] This point was expressed in dissent by Justice Pashman who stated that "one of the most important functions performed by state constitutional bills of rights which is not performed by the federal constitution is the protection of citizens against private oppression as well as oppression by the state". *King v. South Jersey Nat'l Bank,* 66 N.J. 161, 193, 330 A.2d 1 (1974) (Pashman, J., dissenting) (citations omitted).

It is also clear that while state constitutions may be distinct repositories of fundamental rights independent of the federal Constitution, there nonetheless exist meaningful parallels between the federal Constitution and state constitutions, especially in the areas where constitutional values are shared, such as speech and assembly. Indicative of such mutuality, our State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but also expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging "the liberty of speech". N.J. Const. (1947), Art. I, par. 6.

We conclude, therefore, that the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.

Against this constitutional backdrop must be addressed the question of whether the State Constitution's guarantees of speech and assembly under Article I, paragraphs 6 and 18 apply to the distribution of political materials by defendant Schmid upon the Princeton University campus on April 5, 1978. This question brings us to the heart of the problem—the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly.

In the comparable federal setting, private property not used by the public or made available for public use does not

ordinarily become subject directly to restrictions in favor of the public. *Hynes v. Oradell,* 425 U.S. 610, 619, 620, 96 S.Ct. 1755, 1760, 48 L. Ed. 2d 243, 252 (1976). Moreover, private property does not "lose its private character merely because the public is generally invited to use it for designated purposes". *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 569, 92 S. Ct. at 2229, 33 L. Ed. 2d at 143. See *PruneYard Shopping Center v. Robins, supra,* U.S. at 100 S. Ct. at 2041, 64 L. Ed. 2d at 752; *Hudgens v. NLRB, supra,* 424 U.S. at 519-520, 96 S. Ct. at 1036, 47 L. Ed. 2d at 206-207. Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights. *Marsh v. Alabama, supra,* 326 U.S. at 506, 66 S. Ct. at 278, 90 L. Ed. at 268.

There is a parallel under our State Constitution. The state constitutional equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important rights of speech, assembly, petition and the like, private property itself remains protected under due process standards from untoward interference with or confiscatory restrictions upon its reasonable use. *Robins v. PruneYard Shopping Center, supra,* 23 Cal. 3d at 910-911, 592 P.2d at 347-348, 153 Cal. Rptr. at 860-861; see *King v. South Jersey Nat'l Bank, supra,* 66 N.J. at 175, 330 A.2d 1. The constitutional protection of private property against undue interference or "taking" is secured by our own Constitution. N.J. Const. (1947), Art. I, pars. 1 and 20.

On the other hand, it is also clear that private property may be subjected by the state, within constitutional bounds, to reasonable restrictions upon its use in order to serve the public welfare. See, *e.g., Vasquez v. Glassboro Service Ass'n,* 83 N.J. 86, 100-101, 415 A.2d 1156 (1980); *Garrow v. Elizabeth General Hosp. & Dispensary,* 79 N.J. 549, 560-561, 401 A.2d 533 (1979); *Doe v. Bridgeton Hosp. Ass'n,* 71 N.J. 478, 487-488, 366 A.2d 641 (1976), *cert. den.,* 433 U.S. 914, 97 S. Ct. 2987, 53 L. Ed. 2d

1100 (1977); *State v. Shack*, 58 N.J. 297, 305-308, 277 A.2d 369 (1971); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 395-401, 192 A.2d 817 (1963); *Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J. Super. 379, 386-387, 324 A.2d 35 (App. Div. 1974), *certif. den.*, 66 N.J. 317, 331 A.2d 17 (1974); *cf. State v. Miller, supra*, 83 N.J. at 415, 416 A.2d 821 (1980) (while "preservation of aesthetics and property values is a legitimate end for a municipal zoning ordinance", an ordinance generally prohibiting property owners from placing signs on their property violates the protected First Amendment interests of those property owners). In this regard, the United States Supreme Court has recently acknowledged that

> [i]t is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation . . . . [*PruneYard Shopping Center v. Robins, supra*, U.S. at , 100 S. Ct. at 2040-2041, 64 L. Ed. 2d at 752.]

The California Supreme Court, in the same case, found that such restrictions upon private property could properly be imposed in order to protect the rights of free speech and petition, *viz*:

> To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights. [*Robins v. PruneYard Shopping Center, supra*, 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.]

We are thus constrained to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property. In seeking this optimum, we can derive some guidance from certain of the Supreme Court cases, such as *Marsh v. Alabama, supra; Lloyd Corp. v. Tanner, supra*, and *PruneYard Shopping Center v. Robins, supra*, which recognize

generally that the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property. Since it is our State Constitution which we are here expounding, it is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property. See *Vasquez v. Glassboro Service Ass'n, supra,* 83 N.J. at 100-101, 415 A.2d 1156; *State v. Shack, supra,* 58 N.J. at 305-308, 277 A.2d 369; *Zelenka v. Benevolent & Protective Order of Elks, supra,* 129 N.J. Super. at 386-387, 324 A.2d 35.

Accordingly, we now hold that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

Even when an owner of private property is constitutionally obligated under such a standard to honor speech and assembly rights of others, private property rights themselves must nonetheless be protected. The owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property. It is at this level of analysis—assessing the reasonableness of such restrictions—that weight may be given to whether there exist con-

venient and feasible alternative means to individuals to engage in substantially the same expressional activity. While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights.

Taken together, these are the relevant considerations which must be brought to bear in order to reach an ultimate determination in this case as to the constitutionality of Schmid's trespass conviction for attempting to exercise his rights of speech and assembly upon the Princeton University campus. The record in this appeal is to be assessed in light of the constitutional standard herein set forth.

IV

The application of the appropriate standard in this case must commence with an examination of the primary use of the private property, namely, the campus and facilities of Princeton University. Princeton University itself has furnished the answer to this inquiry in expansively expressing its overriding educational goals, *viz*:

> The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom.
>
> . . . . . .

> Free Speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight . . . . [University Regulations, *supra* (1975 as amended 1976).]

No one questions that Princeton University has honored this grand ideal and has in fact dedicated its facilities and property to achieve the educational goals expounded in this compelling statement.

In examining next the extent and nature of a public invitation to use its property, we note that a public presence within Princeton University is entirely consonant with the University's expressed educational mission. Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. The commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the University. The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the "outside world", *i.e.*, the public at large. Princeton University has indeed invited such public uses of its resources in fulfillment of its broader educational ideals and objectives.[10]

The further question is whether the expressional activities undertaken by the defendant in this case are discordant in any sense with both the private and public uses of the campus and

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[10] Princeton University in its regulations has dealt extensively with "[c]ommunity use of University resources." Public participation in activities involving the use of University facilities may be by explicit invitation relating to "activities . . . [which] are an integral part of the University's function as an educational institution," by "implicit invitation" as to its grounds and walkways "generally available to the public," by "participation in University-sponsored or sanctioned programs," or by "private invitation" if no other form of invitation is applicable. University Regulations, *supra* note 2 (1975, as amended 1976).

facilities of the University. There is nothing in the record to suggest that Schmid was evicted because the purpose of his activities, distributing political literature, offended the University's educational policies. The reasonable and normal inference thus to be extracted from the record in the instant case is that defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes.[11] Further, there is no indication that even under the terms of the University's own regulations, Schmid's activities in any way, directly or demonstrably "disrupt[ed] the regular and essential operations of the University" or that in either the time, the place, or the manner of Schmid's distribution of the political materials, he "significantly infringed on the rights of others" or caused any interference or inconvenience with respect to the normal use of University property and the normal routine and activities of the college community.

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[11] Supportive of this conclusion is the following excerpt from Princeton University President William G. Bowen in "The Role of the University as an Institution in Confronting External Issues" (January 6, 1978):

> Central to the philosophy of education is the proposition that the University has a responsibility to expose students and faculty members to a wide variety of views on controversial questions . . . .
>
> Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking, here about something that is merely desirable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society—a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint of the loneliest dissenter, is encouraged to think independently.

As noted by Professor Emerson, "freedom of expression is [both] an essential process for advancing knowledge and discovering truth" and "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." T. Emerson, *The System of Freedom of Expression* 6, 7 (1970).

Without necessarily endorsing any of the foregoing conclusions, the University nevertheless contends that its solicitation regulation was properly invoked against Schmid in this case because it requires that there be a specific invitation from on-campus organizations or students and a specific official authorization before an individual may enter upon University premises even for the purpose of exercising constitutional rights of speech and assembly. It points out that Schmid failed to obtain such permission. The University stresses the necessity for and reasonableness of such a regulation.

In addressing this argument, we must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. See, *e.g., Healy v. James, supra,* 408 U.S. at 180, 92 S. Ct. at 2345, 33 L. Ed. 2d at 279; *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 513-514, 89 S. Ct. 733, 740-741, 21 L. Ed. 2d 731, 741-742 (1969).[12] Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

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[12] The public's right to exercise its freedom of speech does not mandate unrestricted access to university facilities. Even with respect to public property, the public's use of that property for First Amendment activity may be restricted, if not actually prohibited. See, *e.g., Adderley v. Florida,* 385 U.S. 39, 47, 87 S. Ct. 242, 247, 17 L.Ed.2d 149, 155-156 (1966) (public may be prohibited from demonstrating on the grounds of county jail); *American Future Systems, Inc. v. Pennsylvania State Univ.,* 618 F.2d 252, 255 (3 Cir. 1980) (state university regulation forbidding sales demonstrations and solicitation in

In this case, however, the University regulations that were applied to Schmid (in contrast to those subsequently adopted, *supra* at 539-541 n.2, at 617-618 n.2) contained no standards, aside from the requirement for invitation and permission, for governing the actual exercise of expressional freedom. Indeed, there were no standards extant regulating the granting or withholding of such authorization, nor did the regulations deal adequately with the time, place, or manner for individuals to exercise their rights of speech and assembly. Regulations thus devoid of reasonable standards designed to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms. *Cf. Tinker v. Des Moines Indep. Community School Dist., supra,* 393 U.S. at 513, 89 S. Ct. at 740, 21 L. Ed. 2d at 741 (exercise of right of free speech on public school grounds must not interfere with educational mission of the institution); *Cox v. Louisiana,* 379 U.S. 536, 556-558, 85 S. Ct. 453, 465-466, 13 L. Ed. 2d 471, 485-486 (1965) (vague statutes cannot be used to prosecute persons for exercising their First Amendment rights); *Wolin v. Port of New York Auth.,* 392 F.2d 83, 93-94 (2 Cir. 1968), *cert. den.,* 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed. 2d 275 (1968) (public authority may issue reasonable regulations for use of bus terminal for public demonstrations; such regulations should balance right of free expression with public right to use terminal for transportation purposes). In these circumstances, given the absence of adequate reasonable regulations, the required accommodation of Schmid's expressional and associational rights, otherwise reasonably exercised, would not constitute an unconstitutional abridgment of Princeton University's property rights. See *PruneYard Shopping Center v. Robins, supra,* U.S. at

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university-owned and operated residence halls is constitutional); *Wolin v. Port of New York Auth.,* 392 F.2d 83, 94 (2 Cir. 1968), *cert. den.* 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed.2d 275 (1968) (regulations may limit public's use of public property for expressional activity to ensure that that activity does not intefere with the use to which the property is dedicated).

, 100 S. Ct. at 2041-2042, 64 L. Ed. 2d at 753 (absent any regulations governing expressional activity, such activity reasonably exercised on private property devoted to public use is protectable under state constitution and does not constitute impermissible infringement upon private property rights). It follows that in the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's State constitutional rights of expression in evicting him and securing his arrest for distributing political literature upon its campus.

We are mindful that Princeton University's regulatory policies governing the time, place, and manner for the exercise of constitutionally-protected speech and associational rights have been modified substantially since the events surrounding Schmid's arrest and now more fully and adequately define the nature of these restrictions. As we have indicated, the content of such regulations, recognizing and controlling the right to engage in expressional activities, may be molded by the availability of alternative means of communication. *Supra* at 563-564, at 630. These current amended regulations exemplify the approaches open to private educational entities seeking to protect their institutional integrity while at the same time recognizing individual rights of speech and assembly and accommodating the public whose presence nurtures academic inquiry and growth. As noted, however, these regulations were not in place when the University interfered with Schmid's reasonable efforts to communicate his political views to those present on its campus in April 1978. Hence, Schmid suffered a constitutional impairment of his State constitutional rights of speech and assembly and his conviction for trespass must therefore be undone.

Accordingly, for the reasons set forth, the judgment below is reversed.

PASHMAN, J., concurring and dissenting in part.

I concur in the judgment of the Court and in Parts I, III, IV and V of Justice Handler's opinion for the majority. I do not, however, share the majority's views in Part II of the opinion,

which discusses and all but decides whether defendant's conviction for criminal trespass was in violation of the First and Fourteenth Amendments of the United States Constitution. The Court's ruling that the conviction was contrary to Article I, paragraphs 6 and 18 of the New Jersey Constitution renders discussion of the First Amendment unnecessary. Because the majority has nevertheless seen fit to examine in detail the questions arising under the federal Constitution, *see ante* at 542-553, at 618-624, I find the following observations warranted.

The three "shopping center cases" decided by the United States Supreme Court, *Hudgens v. N. L. R. B.*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972); *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968); *see also PruneYard Shopping Center v. Robins*, U.S. , 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), and their intellectual predecessor, *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), might appear upon first examination to establish an alternative means of satisfying the Fourteenth Amendment's requirement of "state action". Indeed, in the Supreme Court's most recent discussion of the concept of "state action", *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L.Ed. 2d 185 (1978), the Court described these earler decisions as "[a] second line of cases under the pulbic-function doctrine", *id.* at 158, 98 S. Ct. at 1734—an exception to the requirement of governmental action where private persons exercise powers "traditionally exclusively reserved to the State", *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S. Ct. 449, 454, 42 L.Ed. 2d 477 (1974). *See Flagg Bros., supra*, 436 U.S. at 157-159, 98 S. Ct. at 1733. Yet the divergent results in these cases cannot be reconciled merely by examining whether "state action" was present. In each case, the enforcement of trespass laws permitted the private owners of a business district to exclude those who would use the property for speech-related activities. None of the "shopping center cases" rested on the state action doctrine as the ground

of decision. These holdings seemed to be concerned with a different question: whether the value of the specific property rights enforced by the state outweighed the harm to the particular First Amendment interest at stake. *See generally* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 Sup. Ct. Rev. 221, 232-236.* The use of the label "state action" may be misleading, for the focus of attention here has been the presence or absence of a substantive constitutional violation.

This view is confirmed by examining the four cases involving First Amendment protection of expressive activity on private property. In the earliest decision, *Marsh v. Alabama, supra,* Justice Black summarized the Court's reversal of a conviction for criminal trespass upon a privately owned "company town" as follows:

> In our view the circumstance that the property rights to the premises where the derprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and *the enforcement of such restraint by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.* [326 U.S. at 509, 66 S. Ct. at 280 (emphasis added)]

While Marsh emphasized the assumption of traditional governmental functions by the owners of the "company town", the Court's holding also focused on the government's direct enforcement of the town's restrictive practices by the imposition of criminal sanctions. The state's decision to protect private property at the expense of expressive activity was constitutionally impermissible. "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." *Id.*

These two themes—the presence of direct governmental involvement in the enforcement of private property rights and the balancing of property and First Amendment rights—also run through the three "shopping center cases". In *Logan Valley, supra,* the Court described the question presented as "whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the [shopping center] premises." *Logan Valley, supra,* 391 U.S. at 315, 88 S. Ct. at 1606. The Court answered in the negative and recognized a constitutional right to engage in expressive activity on private property. *Id.* at 325, 88 S. Ct. at 1612. None of the dissenting members of the Court—including Justice Black, the author of *Marsh*— objected to the result of *Logan Valley* because of an asserted absence of "state action". *See id.* at 327-333, 88 S. Ct. at 1613 (Black, J., dissenting); *id.* at 333-337 (Harlan, J., dissenting); *id.* at 337-340, 88 S. Ct. Ct. at 1618 (White, J., dissenting).

Four years later in *Lloyd Corp., supra,* when the Court "substantially repudiated the rationale of *Logan Valley,*" *Prune Yard Shopping Center, supra,* U.S. at , 100 S. Ct. at 2040, 64 L.Ed.2d at 751, the reason was not the absence of "state action". The Court in *Lloyd Corp.* considered whether the protection of free expression in a shopping center that was unrelated to the center's operations "violates rights of private property protected by the Fifth and Fourteenth Amendments". *Lloyd Corp., supra,* 407 U.S. at 553, 92 S. Ct. at 2221. The Court recognized the importance of the "state action" requirement under the First and Fourteenth Amendments. *See id.* at 567, 92 S. Ct. at 2228. Although it did not address whether the provisions of remedies under the trespass laws, which both *Logan Valley* and *Marsh* cited, met that requirement, the Court noted a pronouncement in *Logan Valley* that implicitly supplied the requisite element of "state action":

> [*T*]*he State may not delegate the power, through the use of its trespass laws,* wholly to exclude those members of the public wishing to exercise their First Amendment rights on

> the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. [*Id.* at 560, 92 S. Ct. at 2224 (quoting *Logan Valley, supra,* 391 U.S. at 319-320, 88 S. Ct. at 1608)(emphasis added)]

Without challenging the soundness of this observation, the Court in *Lloyd Corp.* held "that there ha[d] been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle [the] exercise therein [of] the asserted First Amendment rights." *Lloyd Corp., supra,* 407 U.S. at 570, 92 S. Ct. at 2229. The majority reached this conclusion after balancing the rights in question:

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech. [*Id.* at 567, 92 S. Ct. at 2228]

Unlike in *Logan Valley,* therefore, enforcement of property rights imposed no significant bundens on First Amendment rights.

The conflict between *Lloyd Corp.* and *Logan Valley* was resolved by the Court in *Hudgens v. N.L.R.B., supra,* the third of the "shopping center cases". In contending that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case," *Hudgens, supra,* 424 U.S. at 518, 96 S. Ct. at 1035, the Court observed generally that the Constitution did not provide protection or redress "against a private corporation or person who seeks to abridge the free expression of others * * *." *Id.* at 513, 96 S. Ct. at 1033. *March v. Alabama, supra,* was an exception to this principle. *Id.* The *Hudgens* Court found the exception was grounded in the absence of any meaningful distinction between the functions of a company town and a conventional municipality. *Id.* at 514, 96 S. Ct. at 1033. The Court did not discuss the the significance of the

State's use of the trespass laws to enforce the company town's restrictions on speech. However, what is equally important for present purposes is that the Court in *Hudgens* did not reject the function of criminal trespass laws in supplying "state action". Instead, the Court found *Lloyd Corp.* and *Logan Valley* irreconcilable and therefore held "that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this". *Id.* at 521, 96 S. Ct. at 1037; *see Prune Yard Shopping Center, supra,* U.S. at , 100 S. Ct. at 2040, 64 L.Ed. 2d at 752.

It thus appears that in the development of First Amendment doctrine from *Marsh* through *Hudgens,* the Supreme Court was principally concerned with the reach of substantive constitutional protection for expressive activity, and not with the limits of the "state action" doctrine. Consistent with the approach of these decisions, I would be inclined to rule that the definition of common-law property rights, and their enforcement against defendant through criminal trespass laws, constitute state action. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S. Ct. 710, 718, 11 L.Ed. 2d 686 (1964); *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948); *King v. South Jersey Nat'l Bank,* 66 N.J. 161, 180-203, 330 A.2d 1 (1974)(Pashman, J., dissenting).

Of course, the presence of state action does not itself spell out a violation of First Amendment rights; it is merely the premise for substantive constitutional inquiry. Because *Logan Valley, Lloyd Corp.* and *Hudgens* focus on the federal Constitution's safeguard of free speech against judicial enforcement of private property rights, the First Amendment issue before us is not whether Princeton University is a "company town", see *Marsh v. Alabama, supra.* Looking instead to *Lloyd Corp.* as the guiding precedent, we would consider whether the value of the university's property rights outweighs the harm to defendant's expressive rights. The crucial factor in this inquiry is whether there has been "such dedication of" Princeton University "to public use as to entitle [the] exercise therein [of] First Amendment rights", *Lloyd Corp., supra,* 407 U.S. at 570, 92 S.

Ct. at 2229. The non-profit, educational, and indeed public purposes of the university would then assume special relevance.

In *dictum* wholly unnecessary to the Court's judgment, the majority states that the existence of what it considers to be adequate "alternative means of communication" would deprive defendant of a First Amendment right to engage in expressive activity at the university. *Ante* at 551, at 623. It relies on *Lloyd Corp.* for its apparent view that the absence of an adequate alternative forum is an absolute prerequisite for federal constitutional protection. Even assuming this to be so, I do not believe the majority has properly addressed whether defendant could adequately deliver his message from public property to students residing on the university campus. A shopping center has no residents; thus a location on public property near an entrance to the center permits full access to its incoming patrons. *See Lloyd Corp., supra,* 407 U.S. at 566-567, 92 S. Ct. at 2227. A predominantly residential institution like Princeton University presents different problems of access that are not so easily resolved. *Cf. State v. Shack,* 58 N.J. 297, 277 A.2d 369 (1971) (ownership of real property does not include the right to bar access to governmental services available to migrant workers residing on the property by invoking the trespass laws). Sites outside the campus or on the fortuitously located public street running through it may not provide an adequate forum for communicating with the residents of the university. The present record describes the location and physical plant of the university but not the traffic patterns of its residents. *See ante* at 551, at 623. It can support a judgment about access to lifeless buildings but not one about access to people. Even if the absence of an adequate alternative forum were a crucial requirement, the majority's summary analysis does not warrant the conclusion that defendant receives no protection from the First Amendment.

Furthermore, I would accord less significance to the presence of an adequate alternative forum than does the majority. It is true that in *Lloyd Corp.* the Court distinguished the facts before it from those in *Logan Valley* on two grounds: that the

expressive activity was unrelated to the operations of the shopping center, *see Lloyd Corp., supra,* 407 U.S. at 564-565, 92 S. Ct. at 2226, and that "adequate alternative avenues of communication exist[ed]", *id.* at 567, 92 S. Ct. at 2228. But in *Hudgens* the Court repudiated these distinctions as constitutionally insignificant. *See Hudgens, supra,* 424 U.S. at 518-519, 96 S. Ct. at 1035. The Court expressly rejected any approach to the First Amendment that would resolve rights of free speech within a shopping center by reference to the speech's content. *Id.* at 520, 96 S. Ct. at 1036. Addressing the existence of alternative means of communication in *Lloyd Corp.*, the Court noted in *Hudgens* that "the [shopping center] in *Lloyd* more closely resembled the business section in Chickasaw, Ala."—the "company town" of *Marsh*—than the center in *Logan Valley. Id.* at 518 n.5, 96 S. Ct. at 1035 n.5. The dispositive factor in *Lloyd Corp.* that survived the criticism of *Hudgens* was the absence of "such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents therein the asserted First Amendment rights". *Lloyd Corp., supra,* 407 U.S. at 570, 92 S. Ct. at 2229. Contrary to the majority, I believe this ruling expresses the primary criterion for determining whether the First Amendment afforded defendant a right to engage in expressive activity on the grounds of the university. This factor is crucial because it determines whether interests in private property outweigh the harm to defendant's right to free speech.

As I have said, there is no need to resolve this issue—or to discuss it gratuitously—for we have decided that defendant's conviciton for trespass offends the State Constitution. I feel compelled to write only because the majority has expressed what I believe is a restrictive view of the first guarantee in our Bill of Rights. Certainly, the contrast between that view and the Court's State constitutional ruling is difficult to explain. Since I believe the contrast is as unjustified as it is unnecessary, I do not join in Part II of the majority's opinion. I concur, however, in both the judgment of the Court and the balance of my Brother Handler's opinion.

SCHREIBER, J., concurring.

I join in the conclusion reached today by the majority that the judgment of conviction be reversed. However, I am not in accord with the majority's analysis of the United States Supreme Court's opinions concerning the First Amendment and believe that under its decisions the First Amendment (via the Fourteenth Amendment) has not been violated. Moreover, I would hold that Princeton University's obligation under Article I, par. 6 of the New Jersey Constitution depends upon its dedication to the public of its property.[1]

For Schmid to succeed under the First and Fourteenth Amendments he must establish that the actions taken by Princeton University constituted state action. After discussing several theories and rationales and concluding that their application does not constitute state action, *ante* at 544-549, 619-622, the majority seems to say that the holding in *Marsh v. Alabama*, 326 U.S. 601, 66 S. Ct. 276, 90 L.Ed. 265 (1966), may justify a finding of state action under the facts in this case. I do not agree. *Marsh v. Alabama*, must be considered in the light of three succeeding opinions of the United States Supreme Court, *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L.Ed. 2d 603 (1968); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L.Ed.2d 131 (1972), and *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L.Ed.2d 196 (1976).[2]

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[1] It is not clear whether the majority is relying upon a balancing process, *ante* at 560-561, at 628-629, or is in effect advocating the same principle suggested herein. Compare *ante* at 564-566, at 630-632 with *infra* at 639, at 618.

[2] In *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed.1161 (1948), the Supreme Court held that judicial enforcement of a racially restrictive covenant governing a private sale of land constituted state action. Despite ample opportunity to apply the *Shelley* rationale, the Supreme Court has not found that mere prosecution and conviction under a criminal trespass statute furnishes the necessary state action. *See Peterson v.Greenville*, 373 U.S. 244, 83 S. Ct. 1119, 10 L.Ed.2d 323 (1963); *Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L.Ed.2d 338 (1963); *Robinson v. Florida*, 378 U.S. 153, 84 S. Ct. 1693, 12

In *Marsh*, the Supreme Court held that the First and Fourteenth Amendments protected the exercise of free speech in a company-owned town which was open to the public generally. The sole distinguishing characteristic of this town was that title to all the property was vested in a private corporation. Justice Black, writing for the majority, reasoned that "[t]he more an owner, for his advantage, opens up his property to use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. at 506, 66 S. Ct. at 278, 90 L.Ed. at 268. He held that people who lived in a municipality were not to be denied freedom of press and religion simply because a private company holds legal title to all the town. Hence, a Jehovah's Witness who distributed religious literature on the "public" sidewalk against the private owner's wishes could not be convicted of criminal trespass.

In *Logan Valley*, the Supreme Court extended the *Marsh* rationale to provide First Amendment protections for union members picketing a store on shopping center property. It held that the shopping center was "the functional equivalent of a 'business block'" and must be treated in substantially the same manner as the business district in a company town. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. at 325, 88 S. Ct. at 1612, 20 L.Ed.2d at 616. Significantly, Justice Black, author of the *Marsh* opinion, dissented. He wrote that "*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores,

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L.Ed.2d 771 (1964); *Bell v. Maryland*, 378 U.S. 226, 84 S. Ct. 1814, 12 L.Ed.2d 822 (1964). Moreover, the *Marsh* line of cases did not rely upon enforcement of state trespass statutes. Only Justice Marshall has interpreted these cases to hold that state action existed because of trespass actions. *PruneYard Shopping Center v. Robins*, U.S. , , 100 S. Ct. 2035, 2045, 64 L.Ed.2d 741 758 (1980) (Marshall, J., concurring). *See also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-163, 98 S. Ct. 1729, 1734, 56 L.Ed.2d 185, 195-197 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-354, 95 S. Ct. 449, 454, 42 L.Ed.2d 477, 485-486 (1974).

residences, and everything else that goes to make a town." *Id.* at 330, 88 S. Ct. at 1615, 20 L.Ed.2d at 619 (Black, J., dissenting).

Four years later the Supreme Court reconsidered and distinguished *Logan Valley* in *Lloyd Corp. v. Tanner.* The Court held that persons distributing handbills protesting the Vietnam War in a private shopping center were not protected by the First and Fourteenth Amendments and were, therefore, subject to prosecution for criminal trespass. In its opinion the Court described the *Marsh* holding in the following manner: "In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." *Lloyd Corp. v. Tanner,* 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143. The Court distinguished *Logan Valley* by limiting its application to situations in which two factors exist. First, the expression sought to be protected must be related to the use of the private property. Second, there must be no other reasonable opportunity available to the person claiming protection for conveying his message to his intended audience. *Id.* at 563, 92 S. Ct. at 226, 33 L.Ed.2d at 140.

In *Hudgens v. NLRB,* the Supreme Court in an opinion by Justice Stewart held that striking wharehouse employees did not have a First Amendment right to enter a private shopping center to picket a retail outlet. In determining whether the expression was constitutionally protected, the Court did not apply the two elements discussed in *Lloyd.* Instead, it concluded that despite efforts in *Lloyd* to distinguish *Logan Valley,* " the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." *Hudgens v. NLRB,* 424 U.S. at 518, 96 S. Ct. at 1036, 47 L.Ed.2d at 206. *See Prune Yard Shopping Center v. Robins,* U.S. , 100 S. Ct. 2035, 2039, 64 L.Ed.2d 741, 751-752 (1980). Justice Stewart commenced with the premise that the right of free speech is constitutionally guaranteed against abridgment by only the federal or state governments—and that an exception to this truism was *Marsh*—where the company town was the functional equivalent of a municipality. He quoted approvingly from Justice

Black's dissent in *Logan Valley* that the shopping center was not the equivalent of a town. He concluded that, if the shopping center "is the functional equivalent of a municipality," then constitutional protections of the First and Fourteenth Amendments would apply. *Id.*, 424 U.S. at 520, 96 S. Ct. at 1036, 47 L.Ed.2d at 207.

The rationale advanced in *Hudgens*, relying as it does on *Marsh* and Justice Black's dissent in *Logan Valley*, clearly indicates that the characteristics relied upon in *Lloyd* to distinguish *Logan Valley*, namely, related expression and no alternative access, are not relevant. Since *Hudgens* states that *Logan Valley* was not sound, the reasons given in *Lloyd* to distinguish *Logan Valley* cease to be significant. Thus, the presence of speech related to the particular enterprise and the absence of an adequate alternative to presentation of that speech are not determinants of the existence or nonexistence of state action.

Neither *Lloyd* nor *Hudgens* purports to overrule *Marsh*. In fact, they expressly affirm its rationale. However, these decisions make it clear that *Marsh* is not to be given an expansive reading. Private property must possess all the attributes of or be the equivalent of a state-created municipality before it stands in the shoes of the State for First and Fourteenth Amendment purposes. *Lloyd Corp. v. Tanner*, 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143; *Hudgens v. NLRB*, 425 U.S. at 513-522, 96 S. Ct. at 1033-1037, 47 L.Ed.2d at 202-207.

Princeton University is not the functional equivalent of a company town as that term has been construed by the Supreme Court. Its main function is to support an academic community. In doing so, it provides services, such as dormitories, eating facilities, and a security force, which can fairly be classified as "attributes of a state-created municipality". But the present United States Supreme Court decisions require that *all* of the "attributes" be assumed by the private enterprise. *Lloyd Corp. v. Tanner*, 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143. Because of its primary role as an educational institution,

Princeton University lacks a number of important attributes which municipalities typically possess. For example, there is no suggestion in the record that Princeton University's campus has either a commercial district, an elementary or secondary school system, a fire department or a sewage disposal plant. Since Princeton University does not fit within the *Marsh* rationale, its efforts to restrain Schmid's distribution of political literature do not constitute state action. Consequently, the criminal prosecution brought to enforce Princeton's legal rights was not in violation of Schmid's First and Fourteenth Amendment rights.

I agree with the majority that Princeton University under the circumstances here is subject to the free speech strictures of the State Constitution.[3] Unlike its counterpart in the Federal Constitution, the New Jersey constitutional guaranty of free speech is not circumscribed by the need to find state action. However, a countervailing precept in the New Jersey Constitution is the owner's right to possess and protect property. *N.J. Const.* (1947), Art. I, par. 1. In harmonizing these seemingly inconsistent rights, it would appear appropriate to subordinate the property owner's rights to the more fundamental concept of the right of free speech when the owner has dedicated its property for a public use involving public discussion.[4] *See Robinson v. Cahill,* 62 N.J. 473, 491, 303 A.2d 273 (1973), where Chief Justice Weintraub commented that the constitutional right to acquire and hold property is not a likely candidate for preferred treatment as a fundamental right.

An analogous situation may be found in *Doe v. Bridgeton Hospital Ass'n,* 71 N.J. 478, 366 A.2d 641 (1976), in which a woman's right to an abortion conflicted with a hospital's policy

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[3] Article I, par. 6 of the New Jersey Constitution (1947) states:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . .

[4] This case is to be distinguished from the exercise by the State of its general police power impacting on private property interests for public good.

to prevent the use of its property for that purpose. This Court held that the non-sectarian, non-profit hospital which held out the use of its facilities to the general public assumed quasi-public obligations akin to those assumed by common carriers and innkeepers at common law. Accordingly, the hospital, having the facilities and manpower to perform abortions, could not refuse, on moral grounds, to permit use of its facilities to perform an elective abortion.

The nature and extent of the property owner's holding out or dedication of his property for public use determine what, if any, public function has been undertaken. The scope of the constitutional restraints inherent in that public function may then be ascertained. Obviously there must be a nexus between the purpose of the property owner's dedication and the purpose of the public's use. Thus in *Doe* the holding out of the hospital facility for use in a medical capacity would not justify the exercise of a constitutional right to use the hospital as a political forum. Finally, the public's exercise of its constitutional right is subject to the property owner's regulations governing time, place and manner. The reasonableness of such regulations depends upon many factors including alternative means which the public may have available to exercise that constitutional right.

As the majority indicates, Princeton has made its campus available as a forum for an open and robust exchange of political ideas and opinions by both the Princeton community and the public generally. In fact, the University has acknowledged that this type of public debate lies at the core of its intellectual academic life. Such a commitment of its facilities and property constitutes a holding out of this property for a public use. As such Princeton has assumed a public function. Since Schmid's political expression is consistent with the achievement of Princeton's goals, he is entitled to the protection of the right of free speech guaranteed by the New Jersey Constitution.

Moreover, Princeton University's independence, an element which in many respects is essential in the private acade-

mic world, is not thwarted by the State's protection of free speech. It is not a threat to or intrusion upon that independence. Rather, as Justice Handler has cogently pointed out, protection of the public's right to political speech accords with Princeton's fundamental philosophy of open debate. It is precisely for that reason Princeton is subject to the State's interest.

SCHREIBER, J., concurring in the result.

PASHMAN, J., concurring in part and dissenting in part.

For reversal—Chief Justice WILENTZ and Justices SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER, HANDLER and POLLOCK-7.

For affirmance—None.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL
MERCER COUNTY

STATE OF NEW JERSEY

vs

CHRIS A. SCHMID

ORDER ADJUDGING DEFENDANT GUILTY OF VIOLATING *NJSA* 2A:170-31

This appeal from the Municipal Court of the Borough of Princeton was heard in a trial de novo upon a Stipulation of Facts before the Honorable George Y. Schoch, A.J.S.C. sitting without a jury, Jerrold Kamensky, Esquire appearing for defendant, with Sandford Levinson, Esquire admitted pro hoc hac vice, and Robert A. Farkas, First Assistant Prosecutor, appearing on behalf of the State, and the Court having accepted the Stipulation of Facts submitted by the parties and having considered the briefs submitted and the oral argument;

It is on this 20 day of February, 1979 ORDERED AND ADJUDGED that the defendant, Chris A. Schmid, is found guilty of a violation of *NJS* 2A:170-31 and that a fine of $15 and costs of $10 be imposed.

IT IS FURTHER ORDERED that upon the application of the defendant, the payment of said fine and costs shall be stayed pending an appeal to the Superior Court, Appellate Division, which said appeal will be filed by the defendant upon representation of counsel.

/s/ GEORGE Y. SCHOCH
GEORGE Y. SCHOCH, A.J.S.C.

MUNICIPAL COURT OF THE
BOROUGH OF PRINCETON
DOCKET NO. SC53264

STATE OF NEW JERSEY,

Plaintiff,

vs.

CHRIS SCHMID and STEPHEN KOMM,

Defendants.

Decided October 30, 1978.

CARCHMAN, J.M.C.

Defendants Schmid and Komm* were charged with violations of *N.J.S.A.* 2A:170-31 as trespassers on property of Princeton University. The parties have stipulated the facts as follows:

1. Chris Schmid and Stephen Komm, both members of the United States Labor Party were arrested on April 5, 1978, and charged as disorderly persons with violation of New Jersey's general trespass law, *N.J.S.A.* 2A:170-31, while distributing material of the Party (including material offered for purchase) on the grounds of Princeton University, a private not-for-profit educational institution located in Princeton, New Jersey.

2. The U.S. Labor Party, among its other activities, regularly runs candidates for local, state and Federal offices. Some of the material passed out on April 5, 1978, related to the candidacy of a Party member for the office of Mayor of Newark. Other material distributed included general Party literature concerning public issues.

3. Princeton University allows distribution of political materials by any member of the University community. In order for non-University connected persons to distribute material or solicit contributions on campus, permission must be obtained from the Office of the Dean of Student Affairs in the case of the Main Campus of the University, the Office of the

* At trial, the State moved to dismiss the charges against Defendant Komm, which motion was granted.

Director of the Plasma Physics Laboratory in the case of Forrestal Campus, and the Office of the Dean of the Graduate School in the case of the Graduate College.

4. On previous occasions, permission had been sought by non-University members of the U.S. Labor Party without invitations and had been denied. Permission had not been sought immediately prior to the incident on April 5.

5. Prior to his April 5 arrest, defendant Schmid had actual notice of Princeton's policy of refusing to allow persons not connected with the University to enter campus uninvited and without sponsorship for the purpose of soliciting support or contributions, and had been told on at least one occasion on February 15, 1978, that such activity on his part was forbidden and that he was subject to arrest for trespassing if he entered on campus to solicit again. Said notice was through a University proctor (2/15/78).

6. The guidelines for community use of University resources are set out at pp. 67-70 of the 1977-78 edition of *Rights, Rules, Responsibilities: Guidelines for Students,* . . . . The policy on solicitation is set out at page 24 of the same publication. [See copy of page 24 attached as Appendix A]

7. Among the attributes of Princeton University and its student body are the following:

A. Princeton University has two campuses, the main campus and the Forrestal campus, that are separated by a distance of several miles. The Forrestal campus is located in the Township of Plainsboro. The main campus is located partly in the Borough of Princeton and partly in the Township of Princeton. The main campus is bisected by Washington Road, which is a public street. The sidewalks adjacent to Washington Road are located in the public right of way, and, as such, have the same characteristics as any other public sidewalks.

B. Princeton University shares with the Borough and Township of Princeton the costs of the Joint Sewer Operating Committee and of the incinerator. The University purchases its

electricity commercially from Public Service Gas and Electric Company. The University purchases fuel commercially to run its heating plan.

C. Princeton offers undergraduate programs leading to the Bachelor of Arts and Bachelor of Science in Engineering degrees. The program of study for the degree of Bachelor of Arts is described at pages 25-30 of the 1977-78 *Princeton University Undergraduate Announcement*. Undergraduates in the Bachelor of Arts program must complete two one-term course in each of four general areas: Science; Social Science; Arts and Letters; and History, Philosophy, Religion. In general, courses fall into distribution areas according to the departments by which they are offered. The departments in each area are listed below:

Area I, Science

Biology
Chemistry*
Engineering and Applied Science*
Geological and Geophysical Sciences*
Physics*
Psychology*

Area II, Social Science

Anthropology*
Economics
Politics*
Psychology*
Sociology*
Statistics*

Area III, Arts and Letters

Architecture and Urban Planning
Art and Archaeology
Creative Writing*
English

Languages and literature, ancient and modern including literature in translation (excluding 100-level foreign language courses)
Music
Theatre and Dance*
Visual Arts*

Area IV, History, Philosophy, Religion

Classics
East Asian Studies (excluding 100-level foreign language courses)
History
Mathematics*
Near Eastern Studies (excluding 100-level foreign language courses)
Philosophy
Religion
Statistics*

The departmental offices of those departments marked with an asterisk above are located in buildings that are across Washington Road from the central campus (that part of the Main Campus bounded by Nassau Street, University Place, Washington Road and Faculty Road). The majority of classes in other departments are located in the central campus.

The program of study for the Bachelor of Science in Engineering is described at pages 347-350 of the 1977-78 *Princeton University Undergraduate Announcement.* There are no distribution requirements and students concentrate their efforts in the sciences.

All engineering courses and math courses and most science courses are offered in classrooms in buildings across Washington Road from the central campus. In particular, the Engineering Quadrangle is several blocks from the central campus.

D. Approximately 3,725 (83%) undergraduate students live in dormitories or other housing located on that part of the campus of Princeton University bounded by Nassau, Univer-

sity, and Washington Streets, and Faculty Road (hereinafter referred to as the central campus). Approximately 475 (11%) undergraduate students live in Princeton Inn College or at 2 Dickinson Street, both of which are across University Place and Alexander Road from the central campus. About 266 (6%) undergraduate students live in housing off campus.

E. Approximately 525 (36%) graduate students are housed at the Graduate College (including the annexes) located on College Road across University Place and Alexander Street from the central campus. Approximately 165 (11%) graduate students are housed in Lawrence Court Apartments located across Faculty Road and Alexander Street from the central campus. Approximately 250 (17%) more graduate students are housed in apartments on the Butler tract located across Washington Road and Harrison Street about one mile from the central campus. These students represent a total of about 64% of the graduate students and about 15% of the total students enrolled at the University.

F. All members of the first and second year undergraduate classes are required to hold a meal contract at a University owned dining facility. Few exceptions are made to this rule (*e.g.*, 2 of 2,218 in 1977-78). Approximately 1,672 (75%) of these students eat at facilities located on the central campus (Commons, Wilcox Hall in Wilson College, the Student Center or the New South Cafeteria). About 366 (17%) of first and second year students eat at Princeton Inn College located across University Place and Alexander Road from the central campus and another 178 (8%) of these students eat at Stevenson Hall located on Prospect Street across Washington Road. Meal transfers among University facilities are easily obtained and frequently used.

G. Of the undergraduate students in their third and fourth years at the University, approximately 1,354 (60%) have contracts to eat in dining facilities located across Washington Road on Prospect Street either at private eating clubs (which are independent of the University and over which the University

has no direct control) (1,235, 55%) or at Stevenson Hall (119, 5%). Another 248 (11%) have contracts to eat at Wilcox Hall, Commons, New South or the Student Center, all located on the central campus. About 69 students (3%) eat at Princeton Inn College located across University Place and Alexander Road from the central campus. Finally, 567 (25%) of upperclass students are "independent", that is, they have no dining contracts and must purchase and/or prepare food on their own—either in dormitories or apartments where they live or in restaurants or food stores in the surrounding community. Meal transfers between University facilities and the private eating clubs may be obtained and are frequently used.

H. Very few graduate students have contracts to eat at dining facilities on the central campus. About 443 (31%) have meal contracts at the Graduate College and the rest are, for the most part, "independent".

I. Approximately 87% of the student body are citizens of the United States, 18 or over, and therefore eligible to register to vote under the laws of New Jersey or some other state. Approximately 1,500 students are registered to vote in the Borough or Township of Princeton. All of the polling places in the Borough and Township are located off-campus.

J. Religious services for students of various denominations are regularly held at the University Chapel and at the Murray-Dodge Building, both located on the central campus. In addition, services for Orthodox Jewish students are held at Stevenson Hall located on Prospect Street across Washington Road, and services for Roman Catholic students are held at the Aquinas Foundation located on Stockton Street, across University Place and Nassau Street. Students also attend religious services at churches and synagogues throughout the Princeton community.

K. Recreational facilities are located in Dillon Gymnasium and the Baker Hockey Rink, located on the central campus, and in Jadwin Gymnasium located across Washington Road. There are, in addition, outdoor tennis courts located on

the central campus. The football stadium and baseball field are located across Washington Road from the central campus. Athletic practice fields are located both on the central campus and across Washington Road. Lake Carnegie, site of ice skating in winter and sailing and crew races in the spring and fall, is located across Faculty Road from the main campus.

L. The main library is located on the central campus. The Seeley G. Mudd Manuscript Library, the Chemistry, Engineering, Psychology, Population Research and Public and International Affairs libraries are not on the central campus.

M. The Computer Center is located at 85 Prospect Street across Washington Road from the central campus.

N. The administrative offices of the University are located on the central campus. Included among them are the Offices of the Deans of the College, the Graduate College and Student Affairs. Personnel in these offices provide academic and personal counseling to students, and they are responsible for student discipline as well.

O. Princeton University Store is a general department store selling books, records, clothes, radio and television sets, school supplies, cameras, sports equipment, personal hygiene supplies and packaged snack-type food. It also includes a check-cashing facility for the use of students. There are two entrances into the store, one on University Place, the other from the interior of the central campus. The University Store is separately incorporated in the State of New Jersey and is governed by a board of trustees elected in part by the student body.

P. Primary medical care, including psychological counselling, is available at McCosh Infirmary, located on the central campus. Prescription drugs are supplied primarily by drug stores in the local community. Surgical procedures and major medical care is provided through a community hospital.

Q. Daily news coverage is provided the University community by *The Daily Princetonian* and radio station WPRB,

both of which have their offices on the central campus. Both *The Daily Princetonian* and WPRB are separately incorporated and governed by boards of trustees that are completely independent of the University. In addition, the student newspaper agency delivers a number of papers in dormitory rooms including *The New York Times* and the *Washington Post.*

R. Laundry facilities are available in dormitories. In addition, students use laundry facilities located in the community. Dry cleaning services are only available at local commercial establishments.

S. A student "pub" located in the Student Center and the Cafe located in Murray-Dodge provide students with facilities and refreshment, including beer and wine by the glass, for evening relaxation. Packaged liquor must be purchased from commercial establishments off-campus.

T. Students who have their hair cut or styled professionally must do so off-campus. There are no barbers or hair stylists on campus.

U. United States mail is delivered to student dormitories, either by employees of the U. S. Postal Service or of Princeton University. There are mailboxes on the central campus, but stamps must be purchased and packages weighed and mailed at the post office across Nassau Street on Palmer Square.

V. Banking services other than check cashing must be obtained from banks located off-campus.

W. Security for residents of the Princeton University community is provided primarily by the University Security Department, many of whose employees are deputized to make arrests under the laws of New Jersey.

X. The University Art Museum is located on the central campus. A limited selection of art-related books and other materials, including postcards and calendars, are available for purchase at the museum.

Y. The McCarter film series during 1977-78 was held at 10 McCosh Hall, on the central campus. Other film series include that of the Whig-Clio Society, also held on the central campus and the Film Society held at Kresge Auditorium in Frick Lab across Washington Road from the central campus. Most extracurricular lectures open to the community are held on the central campus but a number are held every year at the Woodrow Wilson School auditorium which is across Washington Road from the central campus. Two commercial theatres in the Princeton community, as well as other theatres in surrounding communities, are frequently patronized by students.

Z. Concerts are given on the central campus throughout the year by the Princeton University Orchestra, Band, Glee Club, Freshman [sic] Singers, Opera Theatre, and Musica Alta. There are also a concert series and other musical, film and theatre events offered at McCarter Theatre across University Place from the central campus. The McCarter Theatre Company is separately incorporated and is run by an independent board of trustees.

AA. On the central campus, plays are produced by Theatre Intime at Murray-Dodge Hall and by Wilson College at Wilcox Hall. The Acting Ensemble mounts its productions at 185 Nassau Street, the McCarter Theatre Company puts on about six plays each year at McCarter Theatre, the Triangle Club presents its annual show at McCarter Theatre, and Princeton Inn College offers a number of productions at the Princeton Inn College Theatre—all of these facilities are located off the central campus.

BB. A statement of the "institutional purpose" of Princeton University is contained in "The Role of the University as an Institution in Confronting External Issues", by President William G. Bowen, January 6, 1978, . . ., where President Bowen writes as follows:

> "Central to the philosophy of education is the proposition that the University has a responsibility to expose

students and faculty members to a wide variety of views on controversial questions . . . .

> "Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking here about something that is merely desireable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society—a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint or the loneliest dissenter, is encouraged to think independently."

The University affirms "the fundamental importance of maintaining an atmosphere of maximum freedom and intellectual diversity for the benefit of all who study and learn within it".

8. Princeton University has no fire fighting equipment and it relies on the municipal fire departments for fire protection. In addition, the University relies on the Princeton Rescue Squad for emergency services.

9. As demonstrated by the 1977-78 academic calendar, Princeton holds no summer school session. Student room use contracts begin with the start of classes and expire on the last day of exams each spring (or, in the case of seniors, on graduation day). Very few undergraduate students contract for the use of rooms during the summer.

10. Virtually all of the University's employees—faculty administrators, librarians, technicians, research staff and other supporting staffs—have residences off campus from which they come and to which they return daily.

11. There is no requirement that graduate students live on campus, and the on-campus housing available is insufficient to meet the demand for graduate student housing that exists.

12. Undergraduate students may not live "off campus" without permission from the Dean of Student Affairs. Such permission is routinely granted without inquiry to juniors and seniors. In special circumstances, first and second year students may also obtain permission to reside off campus (*e.g.*, students living at home who wish to commute). Each year about 5% of the student body obtains permission to live off campus. The remaining 95% of the student body resides on campus.

13. The Princeton University Store is open from 9 a.m. to 5:30 p.m. six days a week.

14. With the exception of Baker Rink, and all parking lots, the property and buildings on the central campus are tax exempt. The Princeton University Store pays property taxes on the property it has leased from the University which is located on the central campus.

The novel issue presented is whether *N.J.S.A.* 2A:170-31 can be used to impose criminal sanctions on persons engaged in activity while on the grounds of a private residential university when such activity, if conducted on public property, would be protected by the First and Fourteenth Amendments to the United States Constitution.

The statement of the issue incorporates a concept which neither the State nor the defendants dispute—the activity engaged in by the defendants is activity which if conducted on public property would be protected by the First and Fourteenth Amendments. *Lovell v. Griffin*, 303 U.S. 44 (1938); *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Jamison v. Texas*, 318 U.S. 413 (1943); *Saia v. New York*, 334 U.S. 558 (1948). It is axiomatic that the free expression of political views in a public forum is as fundamental as any right as any contained in the Constitution of the United States.

The defendants' urge that the unique nature of Princeton University is such as to preclude it from having the benefit of

trespass laws (*N.J.S.A.* 2A:170-31) to restrict protected activity, notwithstanding the fact that it is conceded that the University is "private property". The basis of this assertion is the defendants' reliance on the "company town" doctrine as established in *Marsh v. Alabama*, 326 U.S. 501 (1946).

In *Marsh* the defendant was charged with trespassing while distributing religious literature on the premises of a community which was wholly owned by the Gulf Shipbuilding Corporation. As the Court noted at 326 U.S. 502, 503:

> . . . Except for that [private ownership] it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center

except the fact that the title to the property belongs to a private corporation.

The Court recognized that if not for the title being in the Corporation, and assuming title in a municipal corporation, the defendants' conviction for trespass could not have stood and would have been reversed. 326 U.S. at 504. The Court noted also at 507, 508 the following:

> . . . Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

It is patently clear from the Court's decision in *Marsh* that the Court would not allow the sole issue of title to property to govern in a situation where fundamental First and Fourteenth Amendment rights were in dispute and where the isolation and restrictions on the dissemination of information and ideas would be circumvented or curtailed merely by a property right which fictionalized the governmental structure from what would be commonly be considered a public community.

The *Marsh* doctrine became the basis for the next significant "company town" decision in *Amalgamated Food Employees v. Logan Valley Plaza,* 391 U.S. 308 (1968). In *Logan Valley* the Supreme Court reversed a conviction of trespass against

defendants who had been picketing a business enterprise in a "large, newly developed shopping center".

In *Logan Valley*, the Court noted that *Marsh* appeared to deal with the narrow question of distributing leaflets in a "business district" and relying on that rather narrow view of *Marsh* found there was little distinction between the shopping center described in *Logan Valley* and the business district described in *Marsh*. The Court noted further that the defendant's union picketing was limited to one establishment in the shopping center and directly related to the activities of the shopping center.

A most striking aspect of the *Logan Valley* decision can be found in the dissent of Justice Black, the author of *Marsh*. Justice Black noted at 391 U.S. 330-332:

> In affirming petitioners' contentions the majority opinion relies on *Marsh v. Alabama*, supra, and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion except for the fact that it 'is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.' 326 U.S. at 502, 90 L. Ed. at 266. Again toward the end of the opinion we emphasized that 'the town of Chickasaw does not function differently from any other town.' 326 U.S. at 508, 90 L. Ed. at 269. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly

like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town". Indeed, at the time this injunction was issued, there were only two stores on the property. Now there are supposed to be about 17, but they are all conceded to be 'commercial establishments'. The remainder of the property in the center has been laid out as a large parking lot with individually marked parking spaces provided for business customers. All I can say is that this sounds like a very strange 'town' to me.

The majority opinion recognizes the problem with trying to draw too close an analogy to *Marsh*, but faces a dilemma in that *Marsh* is the only possible authority for treating admittedly privately owned property the way the majority does. Thus the majority opinion concedes that 'the respondents here do not own the surrounding residential property and do not provide municipal services therefor'. But that is not crucial, according to the majority, since the appellant in *Marsh* was arrested in the business district of Chickasaw. The majority opinion then concludes that since the petitioner in *Marsh* was given access to the business district of a company town, the petitioners in this case should be given access to the shopping center which was functioning as a business district. But I respectfully suggest that this reasoning completely misreads *Marsh* and begs the question. The question is, under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, i.e., 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated'. 326 U.S. at 502, 90 L. Ed. at 266. I can find nothing in *Marsh* which indicates that if one of these features is present, e.g., a business district, this is sufficient

for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court proceeded to determine the issue left unresolved by *Logan Valley*—whether where the activity is unrelated to the operations of a shopping center, the center may be enjoined from distributing handbills or other information. *Lloyd* narrowly restricted the application of *Logan Valley* to picketing directly related to the shopping center uses. 407 U.S. at 563. In effect the *Lloyd* Court examined the content of the "speech" to ascertain its applicability to the premises. (The "speech" in *Lloyd* being anti-war protesting.) The Court further noted that the *Lloyd* shopping center did not meet the standards of the "company town" as set forth in *Marsh* and was not "public property" which would entitle the protesters to distribute handbills as would be permissible on public property.

Much of the confusion engendered by *Lloyd* and *Logan Valley* was resolved in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). In *Hudgens* Labor Union members were picketing within the confines of a privately owned shopping center. The Court reviewed the history of the *Marsh* doctrine and the subsequent decisions in *Logan Valley* and *Lloyd* and noted: 424 U.S. at 518,

> And in the performance of that duty we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case. Not only did the Lloyd opinion incorporate lengthy excerpts from two of the dissenting opinions in Logan Valley, 407 U.S. at 562-653, 565, 33 L. Ed. 2d 131, 92 S. Ct. 2219; the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley . . . .

It becomes incumbent upon this Court now to measure the argument that Princeton University falls within the scope of the *Marsh* doctrine, as well as *Hudgins*. We are of the opinion that

on the facts before us, Princeton University cannot be considered a "company town" under *Marsh*. The defendants would have the Court pick and choose between those attributes of a self-contained community which the defendant would deem important, and disregard the lack of attributes of the "community" or "towness", which are not found within Princeton University. Thus, it is not simply a matter of substituting "museums" for "sewers" or "radio and newspaper organizations" for "fire departments" which would allow the application of the *Marsh* doctrine (Def. Brief p. 17). It is a community having *all* of the attributes of a "town" which allows it to fall within the scope of the doctrine. The lack of post office, banking facilities, fire department, sewer facility, meaningful commercial area, and the presence of clearly defined restrictions on entry to campus, boundary markings and barriers and restrictions on access to University functions and activities seriously limits a viable argument that Princeton University is a "company town". It is not sufficient to say that the University comes close to being a self-contained community to impose upon it constitutional limitations of these monumental proportions. There can be little doubt that one can distinguish between the distribution of materials on the public streets of Princeton, New Jersey, and the distribution of materials within the private gates of Princeton University. The elimination of the shopping center "fiction" as created in *Logan Valley* and as rejected in *Lloyd* and *Hudgins* would cause the rejection of establishing a "fiction" of creating a "company town" out of a private university. The test cannot be that Princeton University is "substantially like" a "town"; the standard of *Marsh* is that "but for" private ownership, there is no difference between the public and private. As a result, the University cannot be barred on First and Fourteenth Amendments grounds from exercising its rights to prosecute under *N.J.S.A.* 2A:170-31 in this case: *But see Browns v. Mitchell,* 409 F.2d 593 (10th Cir. 1969) which was decided before *Hudgins* and *Lloyd* wherein Judge Murrah stated:

> The students in our case suggest that the various conventional public services and functions performed by

the University give it the color of a public institution and thus may be likened to the company town in Marsh, and the public way in Logan Plaza. From this they seem to rationalize that the disciplinary action complained of was done under color of state law, hence amenable to due process and a violation of civil rights. Superficially, this line of thought has some appeal but it is specious and wholly untenable. We may concede, without deciding, that judged by the totality of its public functions this University may be likened to Marsh and Logan Plaza for the purpose of exercising First and Fourteenth Amendment rights in its public ways. But that is as far as the rationale of these cases takes us.

Nor do we find the "isolation" described in *Peterson v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973), to be applicable to Princeton University. The plight of the migrant workers described in *Peterson* and the other migrant worker cases cited by the parties and the policy considerations which flow therefrom cannot be analogized with that of Princeton University students. While defendants urge that some students never venture beyond the confines of the University, that is a matter of choice, rather than the compulsion by circumstance described in *Peterson*.

The Courts of this state have taken somewhat divergent views regarding the dissemination of information on private property. In *State v. Carr*, 119 N.J. Super. 385 (App. Div. 1972), defendants were convicted of trespassing after attempting to distribute anti-war leaflets while on school property. The Court rejected the constitutional arguments offered by the defendants, and stated

> Here we have a simple trespass case. Defendants were not students and were engaged in non-school activities and they returned to the school grounds after they had been forbidden to be on the property. The public's right and overriding need to have its schools run without outside interference permits a reasonable limitation on defendants'

First Amendment rights. Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970). See also Adderley v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

See also State v. Kolcz, 114 N.J. Super. 408 (Cty. Ct. 1971), which overturned convictions of trespass against defendants who had entered a self-contained retirement community for the purposes of seeking signatures on a petition to change the form of government. The case appears to be decided on constitutional grounds, but is somewhat vague as to the specific constitutional basis of the decision, and query whether the later decisions in *Lloyd* or *Hudgins* would have changed the result in *State v. Kolcz*?

In *State v. Shack*, 58 N.J. 297 (1971), defendants were convicted of trespass after entering onto a migrant farm for the purposes of aiding migrant farm workers in their role as representatives of the Office of Economic Opportunity, a Federal agency. The Court rejected defendants' argument that the migrant labor camp falls within the scope of *Marsh v. Alabama*, supra, and specifically declined to determine the issues on constitutional grounds, holding that state law would preclude the owner of real property from barring the particular defendants from entering onto the migrant worker camps.

While we are satisfied in the present case that the defendants could lawfully be barred, either on a constitutional basis, or under state law, from entering onto University property for the purposes of distributing their literature, if there is to be a reconsideration of the University's policy as to barring similarly situated individuals, it must be on non-constitutional rather than constitutional grounds.

The defendants' most compelling argument lies in the policy consideration of whether a private university, because of its nature and purpose, should provide a forum for all views, no matter how divergent, when such views are expressed in a reasonable, peaceful and orderly manner. While we are not prepared at this time to hold that the present status of the law of this State carves out an exception to the rights of private

property owners to prohibit persons such as the defendant from entering onto private property when the private property owner is a school or university, if there is to be a review of such regulations and prohibitions by the property owner, it must be by the property owner after full consideration of its purposes and ideals. This then becomes a matter not of judicial compulsion, but of judicious restraint on the exercise of extraordinary power by a private property owner. While we hold that the Constitution cannot compel the University to open its gates to third parties wishing to espouse divergent views (and we clearly distinguish this from the laudatory University policy statement which freely allows students and personnel to speak out on all issues) we question, without deciding, whether a private university, dedicated to free expression, meets it commitment by a semblance of restriction on the orderly expression of ideas. Neither the State nor the defendants contend Princeton University should be anything other than a place for the expression and discussion of all views, however divergent, but this standing alone cannot be the basis of the University not having the benefit of the laws of this State.

For the reasons set forth above, we hold that (a) the University is not a company town under *Marsh v. Alabama,* and therefore, reject constitutional arguments set forth by the defendants; and (b) the defendant did, in fact, trespass on the University property after being warned not to do so and is in violation of *N.J.S.A.* 2A:170-31. The defendant is found guilty as charged and is fined $15 and $10 costs.

Princeton University, *Rights, Rules, Responsibilities* . . . , 1977-78 edition, page 24.

Solicitation

No individual or oganization shall solicit charitable donations or customers in the dormitories or other areas of the University without express authorization. Such authorization must be obtained from the Office of the Dean of Student Affairs in the case of buildings and grounds on the main campus; the Office of the Dean of the Graduate School in the case of the Graduate College; or the Office of the Director of the Plasma Physics Laboratory in the case of the buildings and grounds on the Forrestal Campus. Authorization to solicit in academic buildings or University offices will granted only after consultation with the responsible academic and administrative officers.

Persons who are sales agents for off-campus business concerns will ordinarily not be granted permission to advertise or solicit customers on campus except when specifically requested by a recognized University student, employee or faculty organization. Similarly, representatives of off-campus charitable organizations or political groups will ordinarily not be permitted to solicit door-to-door in University dormitories or offices, or in University academic buildings, although they may be permitted to solicit elsewhere on the grounds of the University. Campus-based organizations, profit and non-profit, will usually be granted permission to solicit widely on campus, subject to the general University regulations prohibiting obstruction of University activities or interference with individual rights, upon filing a request with the appropriate official listed above.

SUPREME COURT OF NEW JERSEY

M-405 SEPTEMBER TERM 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRIS SCHMID,

Defendant-Appellant,

and

PRINCETON UNIVERSITY,

Intervenor-Movant.

No member of the Court who voted with the majority having moved, the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 18th day of December, 1980.

/s/ STEPHEN W. TOWNSEND
Clerk

FILED
Dec. 19, 1980
/s/ STEPHEN W. TOWNSEND
Clerk

Filed: March 10, 1981

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY,

Appellants

v. Docket No. A-100-79

CHRIS SCHMID,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Princeton University hereby appeals to the Supreme Court of the United States from judgment of the Supreme Court of the State of New Jersey, entered herein on November 25, 1980.

The State of New Jersey's sole interest in this appeal is that set forth in its letter of December 8, 1980 to the New Jersey Supreme Court, namely that the questions raised are substantial and should be fully litigated.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ THOMAS H. WRIGHT, JR.

Counsel for Appellant Princeton Univ.

/s/ JUDITH A. YASKIN

Acting Attorney General